FILED
SID J. WHITE
APR 23 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DAVID YOUNG,

Appellant,

vs. Case No. 90,207

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

SARA D. BAGGETT
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO. 0857238
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(561) 688-7759

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND RULES PAGES

IN THE SUPREME COURT OF FLORIDA

DAVID YOUNG,

Appellant,

vs. Case No. 90,207

STATE OF FLORIDA,

Appellee.
_____/

PRELIMINARY STATEMENT

Appellant, DAVID YOUNG, 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 presented his version of the direct appeal record, but the following is this Court's interpretation of the record as detailed in its direct appeal opinion:

> In the early hours of August 31, 1986, Young, twenty years old, picked up three juvenile acquaintances, and the quartet decided to steal a car. Young drove to his home and got a sawed-off shotgun. In response to his companions' questioning taking the gun with them, Young told them that if anyone pointed a gun or shot at him he would shoot back. They found a car they liked in a condominium parking lot in Jupiter, broke into it, and broke the steering column in their attempt to steal it. When they heard someone coming out of one of the apartments, they returned to Young's car. The victim, armed with a handgun, and his son approached Young's car. The victim ordered Young and his companions out of the car and told his son to call the authorities. Young got out of the car, taking the shotgun with him, and lay on the ground.
>
> Young's theory of defense at trial was self-defense, but trial testimony conflicted about whether Young or the victim shot first. Three of the victim's neighbors testified that they were familiar with firearms and that the first and last shots came from a shotgun with pistol shots in between. An off-duty state trooper working nearby as a security guard also testified that shotgun blasts preceded and followed the pistol shots. Two of Young's companions testified that the victim shot first.
>
> The victim suffered separate wounds, to the chest and the lower abdomen, from two separate shotgun blasts. An x-ray showed ninety-seven shotgun pellets in his body. The medical examiner testified that both wounds

> were potentially lethal, but that the chest wound was "devastating."
>
> After his arrest, Young claimed that one of his companions shot the victim. When confronted with his companions' statements that he did the shooting, however, Young changed his story and admitted that he shot the victim, but claimed self-defense. The state charged Young with first-degree premeditated murder, burglary of a conveyance, and possession of a short-barreled shotgun. The jury convicted Young as charged and recommended that he be sentenced to death. The court did so, finding four aggravating factors (committed during a burglary, committed for pecuniary gain, committed to avoid or prevent arrest, and committed in a cold, calculated, and premeditated manner) and little in mitigation (church activities, ability to conform to prison rules and regulations).

Young v. State, 579 So. 2d 721, 722-23 (Fla. 1991), cert. denied, 502 U.S. 1105 (1992).

Young filed a motion for postconviction relief on May 13, 1993. (PCR III 374-450). At a hearing on December 1, 1993, the State informed the trial court that it could not respond to Young's motion until the public records issues had been resolved because Young claimed that he could not fully plead the claims without full compliance. (PCR IX 1-34). The trial court agreed and ordered Young to file a "Motion to Compel" within 45 days (by January 14, 1994). It also stayed the State's response until Young had filed a final, amended 3.850 motion. (PCR IX 31-33).

By the time of the status conference set for January 14, 1994, Young had yet to file his "Motion to Compel." Nevertheless, Judge

Lindsey had been replaced by Judge Broome, and Young promptly moved to recuse her, which was granted. (PCR III 456-70, 475-78, 479-80; IX 37-40). Young ultimately filed his "Motion to Compel" on February 23, 1994, (PCR III 481-507), but failed to set if for a hearing until June 2, 1994. By then, he could not get a hearing date until August 17, 1994. (PCSR I 11-12). The hearing did not actually occur until September 7, 1994, then it had to be completed on November 30, 1994. (PCR IX 44-128; X 131-240, 244-306).

At the conclusion of the public records hearing, the trial court allowed Young 60 days to amend his 3.850 motion, and ordered the State to respond 60 days thereafter. (PCR III 538; XI 395). Based on comments Judge Mounts made at the public records hearing, however, Young moved to disqualify him. (PCR III 539-54). Young also filed a direct appeal in this Court, challenging the trial court's denial of his "Motion to Compel." (PCR III 563-64). Following the denial of his "Motion to Disqualify," (PCR IV 569-81), Young moved four days before it was due to stay the filing of his amended motion pending his direct appeal (PCR IV 583-93). At an emergency hearing, the trial court denied the motion to stay, and Young filed his amended 3.850 motion on February 6, 1995. (PCR IV 594-744, 745; XI 408-26). Meanwhile, Young had filed a petition for writ of prohibition in this Court, seeking the disqualification of Judge Mounts, which this Court later denied. (PCR IV 761). It also later dismissed Young's direct appeal. (PCR V 783).

Following a 20-day extension of time, over Young's objection, (PCR 773-75, 826-31, 832, 779-82; XI 429-47), the State filed its response to Young's amended 3.850 motion on May 4, 1995, (PCR VI 885-1024). The case remained inactive until Young filed another motion to disqualify Judge Mounts in September. (PCR V 800-15). That motion was denied in October, (PCSR I 77), and the case remained inactive until February 22, 1996, when the trial court set a status conference. Despite Judge Mounts' absence at the hearing, the Attorney General's Office disclosed that it had recently discovered several audio cassette tapes in its files and that Young needed to make arrangements to have the tapes copied because the Attorney General's Office had no means to make copies without relinquishing custody of the tapes.[1] (PCR XI 453-56).

At another status conference two months later, the Attorney General's Office informed Judge Mounts of its earlier disclosure and noted Young's failure to make any contact regarding reproduction of the tapes. (PCR XI 460-63). Judge Mounts ordered Young's counsel to inspect the Attorney General's files within 30 days and obtain any materials within 45 days. (PCR VI 1077-78; XI 465-69). Following the inspection, the State submitted for an *in*

---

[1] Young had made a public records request on the Attorney General's Office in September 1995, and the agency had invited inspection of its files in October 1995, but Young's counsel had not inspected Young's files by the date of this status conference. Nevertheless, the agency disclosed these tapes to prevent further delay when and if Young ever did inspect its files and then seek time to amend his motion.

camera inspection all of the documents it had withheld from disclosure. Young challenged the claims of exemptions, which were rejected, and moved to depose the custodian, which was denied. (PCR VII 1087-94, 1095-1101, 1111, 1112; PCSR I 95). Thereafter, the trial court allowed Young another 60 days to amend his 3.850 motion. (PCR VII 1113). Given the insignificant changes in the motion, the State relied on its earlier response. (PCR VII 1248-57).

At the Huff hearing set for November 12, 1996, Judge Mounts noted the recently issued rule of judicial administration that requires the original trial judge, if available, to preside over any postconviction proceedings. Since Judge Cohen, who presided over Young's trial, was currently sitting in Juvenile Court, Judge Mounts wanted the parties' opinions on the mandatory nature of the rule. Young's counsel maintained that the rule required Judge Mounts to transfer the case to Judge Cohen. Over the State's displeasure, but not objection, Judge Mounts, in fact, transferred the case to Judge Cohen. (PCR VII 1271; XII 482-510).

Judge Cohen immediately held a Huff hearing on December 2, 1996. (PCR XII 513-56). Following the submission of proposed orders by both parties, Judge Cohen denied all claims, except for that part of Claim VII alleging that trial counsel failed to call two witnesses during the guilt phase who would have supported Young's theory of self-defense. (PCR VIII 1297-1314).

At the evidentiary hearing six weeks later, Young called his trial attorney, Craig Wilson, as a witness. Mr. Wilson testified that he was admitted to practice law in Florida in October 1967 and began his career as a County Solicitor for two years, after which he entered private practice. (PCR XII 564-65). He practiced civil and criminal law with a law firm until 1984, then started his own practice. (PCR XII 565). In his career, he has tried approximately 15 capital cases, and only Young's case has gone to a penalty phase. (PCR XII 566).

After being retained to represent Young at first appearance, Wilson obtained the appointment of a psychologist and a private investigator. (PCR XII 567). His defense became one of self-defense and provocation. (PCR XII 570). He believed that he met with Elizabeth Painter prior to trial, and his investigator's invoice indicated that she had been subpoenaed for trial, but he could not recall why he did not call her as a witness. (PCR XII 585-90). Her deposition was consistent with Young's defense of self-defense because she was not sure whether she heard a shotgun blast first. (PCR XII 578-83). Her statement to the police also indicated that she heard small caliber shots first. (PCR XII 585). However, there was a discrepancy between Elizabeth Painter's testimony and Larry Hessmer's testimony regarding the number of small caliber shots fired. (PCR XII 594-95). Hessmer testified at deposition that he was out in the parking lot and heard a small

caliber shot first. Although his testimony was also inconsistent with the State's theory, Wilson could not remember why he did not call Larry Hessmer as a witness. (PCR XI 595-606).

On cross-examination, Wilson agreed that the autopsy showed two shotgun blasts to the victim's body; thus, Elizabeth Painter possibly missed the first shotgun blast. (PCR XI 615-16). In Wilson's opinion, Painter was equivocal about the order of shots. (PCR XI 618). Wilson also admitted that Larry Hessmer stated that he was not familiar with guns. Hessmer said that he could not tell the difference between the shots and, in Wilson's opinion, was also equivocal about the order of shots. (PCR XI 619-21).

Larry Hessmer testified that he gave a statement to the Jupiter Police Department several hours after the shooting and a deposition several months later. (PCR XII 637-38). He was not subpoenaed for trial, but would have testified if called. (PCR XII 639-40). His testimony would have been consistent with his deposition and police statement. (PCR XII 638-39).

In response to the trial court's questioning, Hessmer testified that he woke up from a sound sleep around 2:00 a.m. and walked to the sliding glass door. He lived on the second floor and his doors were open. He heard movement and screaming, so he went outside to the parking lot. He saw a car with its hood up and three people lying on the ground. (PCR XII 641). He asked the man screaming if he wanted him to call the police, and the man

responded affirmatively, so he went back inside his condominium and called 911. He then returned to the parking lot and got to the front corner of the car when the shooting started. He "heard quite clearly" two light shots, but he was not familiar with guns. (PCR XI 642-43). He then heard a loud blast and dove for cover. The hood on the car went down and he heard three clicks. The driver yelled for everyone to get in and they drove off. He did not see who was shooting. (PCR XII 643-44).

Elizabeth Painter (n/k/a Elizabeth Napolitano) testified that she gave a handwritten statement to the police immediately after the shooting, gave an interview to the police later that day, and gave a deposition sometime later. She was subpoenaed two to four times for trial, but was never called as a witness. (PCR XII 647-50).

Five days after the hearing, the trial court filed a written order denying this part of Claim VII. After noting this Court's finding from the direct appeal opinion that the evidence supported Young's conviction for felony murder, the trial court made the following finding:

> Thus, the order of shots and the entire issue of self-defense is irrelevant. Evidence was sufficient to support a felony murder conviction. In essence, it does not matter who fired first. Young was committing a burglary and the victim died during this criminal episode. Whether the victim fired first or Young fired first does not matter.

> Second, the depositions and written statements of witnesses Hessemer and Painter were equivocal. Although Hessemer's testimony in particular at the evidentiary hearing was more certain than his prior testimony, he only testified to hearing one shotgun blast. The scientific evidence in this case is uncontroverted that there were two shotgun blasts.
>
> Several witnesses testified at trial concerning the two shotgun blasts in addition to the scientific testimony.
>
> Consequently, this Court finds that had Ms. Painter and/or Mr. Hessemer testified at trial that it would not have made any difference in the jury's verdict or recommendation in sentencing.
>
> In essence, the Court finds that testimony from Ms. Painter and/or Mr. Hessemer would have had no significant impact upon the outcome of this case either in the guilt or sentencing phases of trial.

(PCSR 111-12).

Young filed a "Motion for Rehearing" on February 13, 1997, challenging the trial court's ruling. (PCR VIII 1321-27). The trial court denied the motion on March 8, 1997, and this appeal follows. (PCR VIII 1328, 1329). Of the 29 claims raised in Young's 3.850 motion, he challenges the denial of only Claims I-VIII, XXI, and XXIX.

SUMMARY OF ARGUMENT

Issue I - Young's counsel made no objection at the Huff hearing to the State's offer to submit proposed orders and, in fact, submitted a proposed order of his own. Although he later objected by letter to the State's proposed order, he made no specific objections to the substance of the order, only its fact of submission. Be that as it may, the trial court analyzed the claims and modified the State's proposed order before signing it. The fact that it made modifications indicates that it properly performed its function of independently considering Young's claims. Ultimately, however, the issue is whether the record supports the trial court's rulings. The State submits that it does.

Issue II - Fearing that Young had not provided the trial court with a courtesy copy of his "Motion for Rehearing," which had been a pervasive problem in this case, and knowing the trial court's intention to resolve this case expeditiously, the State called the judge's judicial assistant to inquire into the status of Young's motion. It did not discuss the motion with the assistant and had absolutely no contact with the judge. Since no improper *ex parte* contact occurred, reversal is unwarranted.

Issue III - Regarding the sheriff's office's destruction of photographs and taped statements, it provided 190 photographs to Young's counsel pursuant to his public records request. Moreover, the State provided Young's trial counsel with all of the taped

statements in discovery pretrial. Finally, the Attorney General's Office provided Young's collateral counsel with the taped statements of eleven witnesses, plus Young's confession. Because Young failed to show that something specific was destroyed by the sheriff's office, that the specific document or piece of evidence was prejudicial to his defense, and that the sheriff's office destroyed such evidence in bad faith, his claim was properly denied.

As for his claim that the trial court erroneously denied his "Motion to Compel," which sought case files from the Palm Beach County State Attorney's Office, the agency provided 6,990 documents based on the information (name, sex, race, and birth date) provided. Since the agency complied with the request as made, Young's motion to compel that sought documents in a different format was properly denied. Young can file an additional public records request seeking the case files listed in his motion to compel and file a successive 3.850 motion if he obtains material, exculpatory information.

Young had previously disqualified Judge Broome from presiding over his postconviction proceeding. When he sought the recusal of Judge Mounts, he was faced with the greater standard under Florida Rule of Judicial Administration 2.160(g). Since a successor judge "shall not be disqualified . . . unless the successor judge rules that he or she is in fact not fair or impartial in the case," Judge

Mounts was not required to recuse himself. Regardless, the record reveals that Young's basis for recusal was legally insufficient.

Young has not met his burden of showing that the trial court abused its discretion in refusing to allow Young to depose the Attorney General's custodian, who was also opposing counsel in this case. Obviously, the trial court did not need to know the circumstances under which the various assistant attorneys general created their synopses of the trial record in order to rule on the agency's claim that the notes were not public records or were exempt under chapter 119. Since Young failed to meet his burden, this claim should be denied.

This Court has recently reaffirmed that handwritten notes of an assistant attorney general are not public records and can never be subject to disclosure. Therefore, the trial court did not abuse its discretion in finding that the Attorney General's Office properly withheld handwritten notes from disclosure pursuant to Young's public records requests.

Issue IV - The trial court did not abuse its discretion in allowing the State an additional 20 days to file its response to Young's 3.850 motion. Obviously the trial court determined that striking the State's response and finding a waiver of the procedural bars too excessive a sanction for the State's miscalculation of the due date by two days.

Issue V - To the extent Young alleged ineffective assistance of counsel and a Brady violation as to the same piece of evidence, he necessarily failed to meet the tests for proving either claim, and thus the allegations were legally insufficient. Regardless, the record supports the trial court's denial of Claim VII, relating to trial counsel's alleged ineffectiveness in the guilt phase. None of the evidence Young contends trial counsel should have presented would have affected the evidence to support Young's conviction for first-degree felony murder. Thus, Young failed to prove prejudice. As for his allegations that the State failed to disclose its mental impressions of Dr. Roth and Trooper Brinker, and its trial preparation of interviewing witnesses at the "range," such information is specifically exempt from pretrial discovery. Finally, any additional evidence that the victim was an aggressive person who was "sensitive" to criminal conduct and who had previously made citizen arrests would have been cumulative to that already presented.

Issue VI - The trial court was not required to accept as true any allegations that were conclusively refuted by the record. As for Young's allegation that trial counsel failed to present certain evidence to the jury that he presented to the trial court at final sentencing, the record reveals that trial counsel was extremely concerned about opening the door to evidence of Young's six prior nonviolent convictions. Thus, it was reasonable for trial counsel

to minimize the damage and present the evidence solely to the judge. Regardless, Young failed to show that such evidence would have, within a reasonable probability, resulted in a life recommendation.

As for Young's allegation that trial counsel failed to ask Dr. Crown to evaluate Young regarding statutory mental mitigation, the record revealed that defense counsel specifically sought Dr. Crown's appointment two weeks after indictment for the purpose of investigating mental mitigation. Young made no allegations that Dr. Crown failed to perform a competent evaluation. Moreover, it was not reasonable for the court to believe that trial counsel knew that Dr. Crown could testify to brain damage and the existence of statutory mental mitigators, but simply forgot to present that testimony to the trial court at sentencing. Regardless, Young failed to show that such evidence would have, within a reasonable probability, produced a different result.

Since there was no evidence relating to any statutory mental mitigating factor, trial counsel could not have been found ineffective for failing to seek instructions on them. As for counsel's alleged failure to present evidence to the jury of Young's lesser mental age, the trial court heard testimony regarding same and rejected it. There is no basis to assume the jury would have found age as a mitigating factor when other evidence refuted its existence. Similarly, there is no reasonable

probability that evidence of Young's awareness of his adoption and his reaction to it would have affected his sentence, especially since the jury was aware that Young had been adopted.

Finally, Young's challenge to the State's closing argument was properly denied as procedurally barred. It was inappropriate for Young to recast the claim as one of ineffectiveness in order to overcome the bar. Regardless, the decision to object to closing arguments is highly subjective and strategic in nature. Even if counsel should have objected, however, Young failed to show how counsel's failure to do so prejudiced his defense.

Issue VII - Young's challenge to the selection of his petit jury was factually insufficient and procedurally barred. Moreover, this Court has previously rejected this claim. Finally, Young's claim on appeal that trial counsel unreasonably failed to challenge the selection methods was not raised in his 3.850 motion; thus, it cannot be raised on appeal for the first time. Regardless, counsel cannot be deemed ineffective for failing to raise a nonmeritorious claim.

Issue VIII - Young's challenge to the jury instructions, which he alleged shifted the burden to him to prove that life was the appropriate sentence, was procedurally barred. Young's conclusory allegation that trial counsel was ineffective for failing to object to the instructions was inappropriate. Regardless, this Court has

repeatedly rejected this claim. Therefore, counsel cannot be deemed ineffective for failing to raise a nonmeritorious claim.

Issue IX - Young did not make the arguments in his 3.850 motion that he makes in his brief regarding his claim of actual innocence; thus, he has failed to preserve them for review. Regardless, he merely reargues his direct appeal claim that the evidence was insufficient to support his conviction for premeditated and felony murder. Young may not use postconviction, however, as a second appeal.

Issue X - Young made no claim in his 3.850 motion that he was innocent of the death penalty; thus, he may not make the argument for the first time on appeal. Regardless, the substance of his argument either was or could have been argued on direct appeal. Young may not use postconviction as a second appeal. Therefore, this claim should be denied.

Issue XI - Young has no standing to personally challenge the validity of a rule of professional responsibility that this Court issued to govern the actions of Young's counsel. If Young 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 without an evidentiary hearing and should be affirmed.

Issue XII - The trial court had no authority to assess the validity of this Court's harmless error analysis on direct appeal. Therefore, this claim was properly denied without an evidentiary hearing.

ARGUMENT

ISSUE I

WHETHER APPELLANT'S POSTCONVICTION PROCEEDING WAS RENDERED FUNDAMENTALLY UNFAIR BECAUSE THE TRIAL COURT ADOPTED WITH MODIFICATIONS THE STATE'S PROPOSED ORDER PARTIALLY DENYING RELIEF (Restated).

At the conclusion of the Huff hearing before Judge Cohen, the State asked the trial court if it wanted the parties to submit proposed orders. The trial judge responded, "Sure, that will be helpful." Young's counsel made no objection to the procedure. (PCR XII 553-56). Following both parties' submission of their proposed orders, Young's counsel sent a letter to the trial court, objecting to the State's proposed order "in its entirety, as it contains findings of fact and conclusions of law which reflect the opinions of the counsel representing the State, not findings and conclusions made by the Court." **Brief of Appellant** att. 2. Collateral counsel did not specifically point to any misrepresentation of fact or law, or otherwise explain the flaws in the proposed order.

Be that as it may, the trial court modified the State's proposed order and granted an evidentiary hearing on part of Claim VII.[2] As intended, the trial court used the diskette the State had provided to make any changes it deemed necessary in its analysis of

---

[2] The State's proposed order summarily denied all of Claim VII.

the case. The fact that it made changes indicates that it did an independent analysis of the claims and rejected the State's argument that it should summarily deny all of Claim VII. There is no reason to believe that it did not make an equally independent analysis of all of the other claims and decide that the State's proposed order accurately reflected the facts and the law relating to this case. After all, had the trial court intended to merely "rubber stamp" the State's order, it would have done so without modifying the order and without granting an evidentiary hearing.

Young likens this situation to the State preparing a final sentencing order in a capital case, but such a comparison is unavailing. A sentencing order is a breed unto itself. There is not a more solemn, austere, and deliberative order to be written. It requires the weighing of competing factors and means the difference between life and death. While an order granting or denying postconviction relief is not inconsequential, a presumption of validity attaches to a judgment and sentence affirmed by this Court on direct appeal. See Cave v. State, 529 So. 2d 293 (Fla. 1988) ("Unless there is a petition for post-conviction relief, the affirmance of a final conviction ends the role of the courts."). Similarly, the trial court owes tremendous deference to trial counsel's performance. See Strickland v. Washington, 466 U.S. 668, 689 (1986) ("Judicial scrutiny of counsel's performance must be highly deferential."). A postconviction motion simply does not

require the same quality or quantity of independent contemplation and weighing of evidence as does a sentencing order.

Moreover, statutory law requires that the trial court independently weigh the aggravating and mitigating circumstances to determine the appropriate sentence and provide written findings of fact. Its failure to provide those written findings result automatically in a life sentence. Sec. 921.141(3), Fla. Stat. (1997). While a postconviction motion is worthy of no less than studied consideration of the claims, no law or rule requires specific written factual findings, only attachment of records conclusively showing that the defendant is entitled to no relief. Nor does a failure to provide written findings result automatically in the relief requested by the movant.

Finally, adopting a proposed order that opposing counsel has seen and had an opportunity to object to is no different than denying the postconviction motion with a form order and incorporating by reference the State's response to the motion. This method of denying relief has been commonplace in capital cases and has heretofore not created controversy. Trial judges simply do not take the time to make detailed factual findings in postconviction cases. In proposing the order in this case, the State merely wanted to spur the trial court to conclude its function properly by making factual findings. Form orders with attachments and oblique references to their importance simply do

not provide the parties, this Court, or the federal courts with a sufficient basis for appellate/federal review.

Ultimately, the question becomes whether the record supports the denial of Young's claims. Cf. Engle v. Dugger, 576 So. 2d 696, 698 (Fla. 1991) (finding disposition of claim that summary denial was erroneous as matter of law and fact dependent upon sufficiency of allegations). As detailed in the remainder of this brief, the State submits that the trial court's rulings in this initial order, to the extent Young challenges them in this appeal, were proper and that this Court should affirm them.[3] Judge Cohen obviously analyzed the claims before signing the order and made whatever modifications he felt were necessary. Therefore, the "findings" are his own and are fully supported by the record.[4]

---

[3] Young alleges in a footnote that the order "failed to attach portions of the record which conclusively demonstrated that Mr. Young was entitled to no relief." **Brief of Appellant** at 44 n.24. The trial court's 23-page written order denying relief cites to those pages of the record that support its rulings. Since this Court has a copy of the original record, such record references, coupled with the detailed analysis relating to each claim, more than adequately comply with the rule and this Court's case law. See Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993) ("To support summary denial without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion."); Goode v. State, 403 So. 2d 931, 932 (Fla. 1981) (finding trial court's order denying relief not procedurally defective where it referenced specific pages of record in lieu of attachment of portion of files and record).

[4] Young's prayer for relief on this claim seeks reversal "with directions to conduct these proceedings before another judge in a manner that comports with due process." **Brief of Appellant** at 45. If this Court finds that Judge Cohen should have drafted his own

ISSUE II

WHETHER THE STATE ENGAGED IN AN *EX PARTE* COMMUNICATION WITH THE TRIAL COURT REGARDING APPELLANT'S PENDING MOTION FOR REHEARING (Restated).

When this case was transferred from Judge Mounts to Judge Cohen on November 18, 1996, Judge Cohen believed that he had only 90 days to resolve Young's 3.850 motion pursuant to section 924.055, Florida Statutes (Supp. 1996). (PCR XII 516-19). Pursuant to that time frame, Judge Cohen set a Huff hearing for December 2, 1996, and a tentative evidentiary hearing date, if one were needed, for December 13, 1996. (PCR XII 515-23). He ultimately conducted an evidentiary hearing on January 22, 1997, and denied the remainder of Young's postconviction claims by January 27, 1997--a mere two months after receiving the case. (PCR XII 558-667; SR I 110-12).

After Judge Cohen rendered his final order denying relief, Young filed a "Motion for Rehearing" on February 13, 1997. (PCR 1321-27). When the State had received no order on the motion by March 5, 1997, it became concerned that, perhaps, Judge Cohen had

---

order, it should remand for Judge Cohen to draft such an order. There is no reason (and Young provides none) why this Court should remand this cause to a different judge. In the almost four years this case was pending in the trial court, Young successfully recused Judge Broome, sought the recusal of Judge Mounts two separate times, sought a writ of prohibition for his removal, and now wants the original trial judge removed from the case. This Court should not countenance Young's attempts at forum shopping.

not received a copy of the motion.[5] Judge Cohen had been extremely diligent in resolving Young's 3.850 motion expeditiously, and the State believed that Judge Cohen would not intentionally take three weeks or more to resolve Young's motion for rehearing. As a result, the State called Judge Cohen's judicial assistant to inquire into the status of the motion. The State had absolutely no contact with Judge Cohen. As the State feared, the judicial assistant knew nothing about a motion for rehearing and asked the State to fax her a copy of the motion. The State did so and had no further contact with Judge Cohen's office. At no time did the State discuss with the judicial assistant the substance of the motion for rehearing, or anything else related to this case.

Young has already sought from this Court sanctions against the State and relinquishment on this matter to "get the facts" surrounding this alleged *ex parte* communication. (See Def.'s Motion to Relinq. dated Jan. 5, 1998). Following the State's

---

[5] This had been a recurrent problem in this case. For example, Judge Mounts was unaware of Young's second motion to disqualify until he received a copy of the State's response. (PCR IV 569). Later, Judge Mounts granted the State's motion for extension of time, despite the State's indication that opposing counsel would file a response, because he never received the response. (PCR V 832). At a hearing relating to this matter, Judge Mounts noted his "serious difficulties" in obtaining courtesy copies of pleadings and described the problem as "historically pervasive." (PCR XI 436). Collateral counsel maintained that his obligation was to file pleadings only with the clerk. It was either the clerk's duty to forward copies to the judge, or the judge's duty to periodically check the court file for filings. (PCR XI 436-37). Judge Mounts ordered both parties to thereafter serve him with courtesy copies. (PCR XI 439).

response, which in substance mirrors that above, this Court denied Young's motions. The State submits that it engaged in no *ex parte* communication with Judge Cohen in this case.[6] Therefore, this Court should deny this claim.

[6] Curiously, the transcripts of the first public records hearing indicate that Young's counsel had some contact with Judge Mounts, unbeknownst to the State. Young's counsel stated that the judge had requested a copy of some of the pleadings, which counsel had brought to court, (PCR IX 44-49), but none of the prior transcripts or pleadings include any such request by the court. The State can only assume that Young's counsel conversed with the court *ex parte*. The State does not infer, however, that anything improper occurred during the conversation and references this occurrence only to show that *ex parte* contact can occur that is wholly administrative in nature and not worthy of allegations of impropriety.

ISSUE III

WHETHER APPELLANT WAS DENIED ACCESS TO PUBLIC RECORDS AND A FAIR AND IMPARTIAL TRIBUNAL (Restated).

A. Tapes and physical evidence destroyed by the Palm Beach County Sheriff's Office

Young's counsel mailed a public records request, dated April 1, 1993, to Richard Wille, the Sheriff of Palm Beach County, seeking any and all documents relating to David Young. (PCR X 172). Counsel mailed a second public records request, dated April 19, 1993, to the sheriff's office, seeking tapes and photographs not previously disclosed. (PCR X 175). Patricia Gallagher, the central records custodian, referred Young's counsel to the custodians for the photo lab and the evidence section, (PCR X 175-76), so Young's counsel sent a third letter dated April 27, 1993, to Sergeant William Hess, the physical evidence custodian. (PCR X 175-76). Sergeant Hess responded on April 29, 1993, that all of the physical evidence in Young's case had been destroyed on April 2, 1993, pursuant to section 705.105, Florida Statutes. However, he provided copies of the property receipts for all of the physical evidence that he had destroyed. He also indicated that he maintained no documents or photographs. (PCR X 193, 196-98).

Young's original 3.850 motion, filed on May 13, 1993, pled as a claim for relief the nondisclosure of public records and named the Palm Beach County Sheriff's Office as one of the agencies in noncompliance. (PCR III 378-81). Young did not, however, file a

motion to compel disclosure of public records until February 23, 1994--nine months later. He again named the sheriff's office as an agency in noncompliance.[7] (PCR III 492-99).

At the hearing on Young's "Motion to Compel," Monica Elam, a photo technician for the sheriff's office, brought 190 negatives to the hearing and testified that she had supplied copies to CCR that Monday. (PCR X 254-56). According to Michael Reisner, a crime scene technician, he took photos of the autopsy and provided them to the department's photo lab. (PCR X 270). Thus, the 190 negatives Ms. Elam provided included not only crime scene photos, but autopsy photographs as well.

Sergeant Hess, the property/evidence room supervisor for the sheriff's office, testified that he destroyed all of the physical evidence in this case on April 2, 1993. (PCR X 193-97). According to Sergeant Hess, Elaine Mosher, a clerical worker in the office, periodically reviewed the property receipts for closed cases. She conducted a search of the agency's computer, determined whether a case was disposed of by dismissal, conviction, nol pros, or other means, and, if so, put the property receipts for that case in his

---

[7] He also did not set a hearing on his motion until June 2, 1994--another three months later. By the time he set the hearing, he could not get a hearing date until August 17, 1994--another six weeks later. (PCSR I 11-12). The hearing did not actually occur until September 7, 1994, then it had to be completed on November 30, 1994. (PCR IX 44-128; X 131-306). Thus, Young's dispute with the sheriff's office over these records was not resolved for nineteen months.

office. He then located all of the evidence/property relating to that case and destroyed same pursuant to section 705.105 of the Florida Statutes. (PCR X 214-15). Property/evidence could have awaited destruction for several months, depending on his workload. (PCR X 223-24).

Among the items destroyed in this case, according to the property receipts that the department maintains in perpetuity, were taped statements of witnesses, Young's taped confession, photo lineups, a pajama top and bottom, and a screwdriver. (PCR X 200-03). A number of items, such as a reel tape, had been checked out and not returned. (PCR X 204-05). While central records may have gotten a public records request dated April 1, 1993, he did not receive a request until April 27, 1993. (PCR X 215-16).

Detective Vanvil Gardner, who assisted in the investigation by the sheriff's office, testified that he interviewed witnesses and gave the taped statements to the lead detective or to the evidence room. Tapes are maintained in the evidence room to preserve their chain of custody. (PCR X 285-86). Detective Jack Roberson and Detective Sergeant Springer also testified that they turned several taped statements into the evidence room, along with any diagrams drawn by the witnesses. (PCR X 290-91, 293).

Finally, Elaine Mosher testified that when she worked in the property/evidence room she went through property receipts daily for closed cases. (PCR X 296). She checked the computer to confirm

their disposition, which in a capital case was the resolution of the appeal, then turned the property receipts over to Sergeant Hess. (PCR X 297-300). It took her a year or more to go from the oldest cases to the newest cases. (PCR XI 320-21).

Following the disclosure of the photographs and other documents from the sheriff's office, Young amended his 3.850 motion. In Claim II of his motion, Young alleged that the sheriff's office's destruction of evidence denied him due process and equal protection. (PCR IV 605-10). Despite the production of the 190 photographs, Young claimed that the sheriff's office had improperly destroyed all photographs, as well as audiotapes of witness interviews. (PCR IV 605-06).

In February 1996, the Attorney General's Office discovered numerous cassette tapes of witness interviews and Young's confession in its files.[8] Despite the fact that CCR had never inspected the attorney general's files pursuant to its public records request, the agency disclosed the existence of the tapes at

---

[8] Though not specifically detailed in the record, the tapes were contained in a Palm Beach County Sheriff's Department Evidence bag with David Young's name and agency case number on it. A notation on the bag indicated that the contents of the bag were "Copy of Cassette Tapes - Set #2." The bag contained nine audio cassettes of the following witness interviews: (1) Jacquline Green, (2) David Young, (3) Jerrold Saffold, (4) Nelson Barrios, (5) Troopers Mike Brinker and Dan Jowers, Larry Hessmer, and Dana Thomas (all on one tape), (6) Tony Holmes, (7) Gerald Harris, (8) a second copy of Gerald Harris, and (9) Diane Griffiths and Elizabeth Painter (both on one tape).

a status hearing in February.[9] (PCR XI 453-56). Because of the disclosure, Young was given additional time to file a second amended motion. Despite the disclosure of the audio cassettes and the previous disclosure of the photographs, Young maintained in Claim II of his second amended 3.850 motion that the Palm Beach County Sheriff's Office improperly destroyed photographs and witness interviews, requiring a new trial. (PCR VII 1125-29). Ultimately, the trial court ruled that

> Claim II, relating to Defendant's allegations of willful destruction of evidence by the sheriff's department, is not a claim cognizable by Rule 3.850, and is hereby denied. Even were it a valid claim for relief, Defendant has failed to make a prima facie showing of willfulness or prejudice such as would warrant an evidentiary hearing or relief.

(PCR VIII 1297).

Even now, despite the disclosure of the photographs and tapes, Young maintains that he deserves a new trial because the sheriff's department unlawfully destroyed such evidence. **Brief of Appellant** at 47-49. The State submits that this claim was properly denied. First, it was not a cognizable postconviction claim. Rule 3.850 details the claims that can be raised in a postconviction motion. Such claims must challenge the validity of the original judgment

---

[9] Despite this disclosure in February, CCR had made no attempt to obtain copies of the tapes by the next status conference in late April. Ultimately, the trial court ordered CCR to inspect the attorney general's files within a prescribed time (30 days) and obtain copies of any desired documents or tapes. (PCR XI 460-70).

and sentence. This claim does not relate to the judgment and sentence, but rather attacks the sheriff's department's actions as a violation of the Public Records Act. David Young should not obtain a new trial because the sheriff's department destroyed some tapes and diagrams, a number of which he obtained from another agency.

Second, Young obtained 190 photographs from the sheriff's office and nine cassette tapes of witness interviews from the attorney general's office. In his final, amended motion, he failed to allege with specificity what the sheriff's department had destroyed that he did not have.[10] More importantly, he failed to allege with specificity what among those materials would have proven, within a reasonable probability, that the outcome of his trial would have been different had the sheriff's office not destroyed it. As with a Brady claim, Young must allege with specificity what the evidence was that was destroyed and how it prejudiced his defense. See Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988).

Finally, as with evidence destroyed pretrial, Young must show that the sheriff's office destroyed such evidence in bad faith. See Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("We therefore hold that unless a criminal defendant can show bad faith on the

---

[10] The State would also note that it provided to Young's trial counsel all of the taped witness statements in discovery pretrial. (R 4272-76).

part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."); Kelley v. State, 486 So. 2d 578, 580-82 (Fla. 1986). Sergeant Hess testified that his clerical staff had flagged Young's case for destruction sometime prior to its actual destruction on April 2, 1993. It was chosen for destruction as part of a daily routine to purge physical evidence in closed cases. The fact that Young's initial records request was dated April 1, 1993, does not in any way show that the sheriff's office was in receipt of the letter on April 2, nor does it disprove Sergeant Hess' testimony that he was unaware of a records request until he received a request dated April 27, 1993.

Nothing about the destruction of the tapes and other physical evidence shows bad faith. Despite the definition of "public records" in chapter 119, the sheriff's department treated taped witness statements, diagrams, taped confessions, and the like as physical evidence so as to maintain a chain of custody. If such tapes, etc., were merely given to central records with the police reports, a defendant could argue during trial that a confession lacked a chain of custody and could have been altered while in central records. Clearly, chapter 119 cannot override the protocol for the maintenance of important physical evidence for use at a trial. Ultimately, Young failed to show that something specific was destroyed, that the specific document or piece of evidence was prejudicial to his defense, and that the sheriff's department

destroyed such evidence in bad faith. As a result, his claim was properly denied.

B. State Attorney's Office noncompliance

Young sent a public records request dated April 1, 1993, to the State Attorney's Office for the Fifteenth Judicial Circuit, seeking any and all records related to David Young. (PCR XI 354-55). In a letter dated April 13, 1993, Young requested additional files relating to the following individuals:

> Tony Richard Holmes, B/M, 06/21/70
> Jon French, B/M, 06/16/61
> Johnnie Lee Allen, B/M, 07/31/67
> Clifford L. Leonard, B/M, 09/22/69
> Lorenzo N. Pugh, B/M, 12/26/63
> Ricky D. Underwood, 02/07/63
> Wesley Hinson, B/M, 03/04/69
> Gerald L. Saffold, B/M, 10/30/70
> Jerrold L. Harris, B/M, 01/25/71
> Jacquline L. Green, B/F, 11/15/64
> Elizabeth Painter, W/F, 04/08/54
> Diane Griffiths, W/F, 12/28/38
> Larry Hessmer, W/M, 08/03/29
> Dana L. Thomas, W/F, 06/29/73

(PCR XI 355 Def. Exh. 15).[11] According to Paul Zacks, the records custodian, he and his secretary personally searched the office's computer for every reference to every name provided in both of the requests. (PCR XI 354-60). They found **6,990** pages of documents. (PCR XI 357). An investigator for CCR came to the office on April 21, 1993, reviewed the documents Mr. Zacks had found, and requested

[11] This exhibit has been appended to this brief for the Court's convenience as Appendix A.

copies of all.[12] (PCR XI 365). In a letter dated June 11, 1993, to the investigator, Mr. Zacks requested payment and shipping instructions. (PCR XI 365-66). Since the bill was paid, Mr. Zacks assumed CCR had received the records. (PCR XI 367).

On February 23, 1994, Young filed a "Motion to Compel Disclosure of Documents," naming the State Attorney's Office as an agency in noncompliance. Specifically, he provided case numbers for his own files and those of nine other individuals that the state attorney's office had allegedly not provided.[13] (PCR III 486-92). At the hearing on the motion, Mr. Zacks explained that the original requests did not contain case numbers; rather, they contained only names and dates of birth. He performed an exhaustive search based on the information CCR gave him and found 6,990 documents. He could not say whether he provided those specific case files, because it was cost prohibitive to make a copy of the 6,990 documents he provided. (PCR XI 373-77).

Despite CCR's assurance that the case files listed in the "Motion to Compel" were not provided in the 6,990 pages of materials, the trial court ultimately denied the motion to the extent it alleged noncompliance by the state attorney's office. (PCR XI 377-82). In doing so, it noted that CCR did not complain

---

[12] For some reason, the investigator came again in early June. (PCR XI 365-66).

[13] Those nine individuals were among the fourteen individuals listed on the April 13 request.

about the state attorney's compliance between June 1993 and February 1994. (PCR XI 385-86). It also expressed concern about what it perceived as unreasonable delay in capital cases, and even went so far as to invite memoranda on the subject, which prompted a motion to disqualify. (PCR XI 397-99).

Following the denial of his "Motion to Compel," Young filed a notice of appeal, seeking review in this Court of the court's order as an appeal of right. Following the preparation of an appellate record, this Court dismissed the appeal, presumedly because Young was attempting to appeal an interlocutory order as if it were a final order. (PCR V 783). Young then filed a civil complaint in circuit court, seeking disclosure of the state attorney's files. Given the trial court's order in the criminal case, the civil judge dismissed the complaint as a sham pleading. See App. B. Young's appeal to the Fourth District Court of Appeal was denied because he failed to produce the transcripts of the civil hearing during which his complaint was dismissed. See App. C.

In this appeal, Young claims that the trial court abused its discretion in denying his "Motion to Compel." He maintains that he is entitled to the case files listed in the motion. **Brief of Appellant** at 49-52. Young has failed to meet his burden, however, of showing an abuse of discretion. Based on the information provided in the records requests (names, sex, race, and dates of birth), the state attorney's office made a diligent search and

provided Young an opportunity to inspect the records found. Twice CCR sent an investigator to review those documents before they were copied and mailed. At no time did the investigator indicate that the disclosure was incomplete. And for the next **eight months**, CCR gave the state attorney's office no indication that any records were missing, nor did it make supplemental records requests for the case files listed in the "Motion to Compel."

The state attorney's office complied with the letter and spirit of the public records requests made. While perhaps the agency should have made a duplicate copy or inventoried every one of the 6,990 pages of documents to later defend itself in court, it could not justify the additional expenditure of money or manpower to do so. Unfortunately, having failed to do so, it was then faced with proving a negative, i.e., that those case files were not included in the 6,990 pages provided.

Faced with a case over a year and a half old, and an agency that had provided 6,990 pages of documents after two inspections by the agency requesting them, the trial court made the decision to deny the motion to compel. Under the circumstances, that decision was both reasonable and proper. CCR has been able since that time to file supplemental requests under chapter 119, Florida Statutes, for those specific case files. If it chooses to do so, and if it discovers information that, within a reasonable probability, would produce Young's acquittal on retrial, then it can file a successive

3.850 motion and obtain relief. In the meantime, this Court should affirm the denial of his motion to compel and his motion for postconviction relief.

C. Denial of Motions to Disqualify Judge Mounts

Judge Cohen, who presided over Young's trial, was assigned to the Juvenile Division when Young filed his 3.850 motion. As a result, his case was assigned to Judge Lindsey, who was then sitting in Judge Cohen's criminal division. When Judge Lindsey was subsequently rotated to a different division, Young's case was assigned to Judge Broome, whom Young successfully moved to disqualify. The case was then randomly assigned to Judge Mounts. (PCR III 456-70, 475-78, 479-80).

At the end of a two-day hearing on Young's "Motion to Compel Disclosure of Documents," Judge Mounts invited the parties to submit legal memoranda on the subject of delay in capital cases. (PCR X 397-99). Young then moved to recuse Judge Mounts, which the court denied without hearing or comment. (PCR III 539-54; IV 569-81). This Court later denied Young's Petition for Writ of Prohibition, seeking Judge Mount's recusal. (PCR IV 761). Finally, Young raised the denial of his motion to recuse as a claim for postconviction relief, but Judge Cohen denied the claim as moot. (PCR VIII 1298).

Young now re-raises the claim because Judge Mounts denied his "Motion to Compel," which allegedly prejudiced his ability to

litigate his 3.850 motion. **Brief of Appellant** at 52-56. Florida Rule of Judicial Administration 2.160(g) states that

> [i]f a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may pass on the truth of the facts alleged in support of the motion.

Young had already successfully recused Judge Broome; thus, he was faced with the far greater standard of Rule 2.160(g). By denying the motion, Judge Mounts ruled that he could, in fact, be fair and impartial. As a result, he was not required to recuse himself. See Norris v. State, 695 So. 2d 922 (Fla. 3d DCA 1997).

As for the merits of Young's allegations, the record speaks for itself. Judge Mounts was obviously frustrated with the process, but patiently and painstakingly presided over Young's proceeding for almost three years before transferring the case to Judge Cohen. While he may have ruled against Young on occasion, he thoughtfully considered every motion and request. As the Fourth District Court of Appeal noted in Nassetta v. Kaplan, 557 So. 2d 919, 921 (Fla. 4th DCA 1990),

> motions to disqualify trial judges are becoming more prevalent in South Florida. We increasingly encounter situations where the motive behind a motion to disqualify is obviously to gain a continuance or to get rid of a judge who evidences doubt or displeasure as to the efficacy of the movant's cause of action by oral comment or by entering adverse

> judicial rulings. A judge's remarks that he is not impressed with a lawyer's, or his client's behavior are not, without more, grounds for recusal.

The court's observations are no more true than in this case. See also Scott v. State, 23 Fla. L. Weekly S175, 175 (Fla. Mar. 26, 1998) (affirming denial of seven motions to disqualify filed against Judge Mounts in capital postconviction proceeding). Judge Mounts properly denied the motion to disqualify, and this Court should affirm that ruling. Cf. Correll v. State, 698 So. 2d 522, 524-25 (Fla. 1977) (affirming denial of recusal motion based on allegation that trial judge exhibited bias by suggesting that CCR used chapter 119 as delaying tactic).

D. Denial of Motion to Depose Assistant Attorney General

Young served a public records request on the Attorney General's Office in September 1995 for any and all records relating to David Young. On October 6, 1995, the agency responded that the records would be made available for inspection at a mutually convenient time and that CCR should call to make an appointment. In February 1996, despite CCR's failure to make contact regarding the inspection of its files, the Attorney General's Office revealed at a status conference that it had recently discovered in its files numerous sought-after audio cassettes containing witness interviews. (PCR XI 453-56). When CCR had failed to make contact regarding reproduction of the tapes by the next status conference in late April, the trial court ordered CCR to inspect the Attorney

General's files within a specified period. (PCR VI 1077-78; XI 460-70).

Following CCR's inspection of the agency's files, the custodian sent to the judge a copy of all materials withheld from disclosure, along with an inventory of the material and an affidavit that the copies were an exact duplicate of the original documents withheld.[14] Among the documents withheld were handwritten notes made by the various assistant attorneys general who had worked on the direct appeal, the petition for writ of certiorari, and the 3.850 proceeding. The agency argued that these documents were not "public records" as defined by the statute, and thus were not subject to disclosure. Based on this argument, Young filed a "Memorandum of Law Regarding State's Exemptions with Request to Permit Deposition." (PCR VII 1087-94). Young alleged, *inter alia*, that he needed to depose the custodian because "notes" could be, in some instances, public records. According to Young, "[f]actual development of the circumstances surrounding the creation of the 'notes' at issue [was] required before the Court [could] conduct the in camera inspection in this case." (PCR VII 1091).

The State responded that its reasons for nondisclosure were legally sufficient, were supported by the both case law and

---

[14] Following the trial court's *in camera* review of this material, it returned the materials to the Attorney General's Office, and the custodian immediately sealed it and filed it with the clerk's office for inclusion in the record on appeal. (PCSR I 93-94).

statute, and that Young failed to establish "good cause" under State v. Lewis, 656 So. 2d 1248, 1250 (Fla. 1994), for deposing not only a custodian, but also opposing counsel in this case. (PCR VII 1095-1101). Ultimately, the trial court rejected Young's challenges to the agency's nondisclosure and denied his request to depose the custodian. (PCR VII 1111, 1112). Young now claims that the trial court erred in refusing to allow him to depose the Attorney General's custodian. **Brief of Appellant** at 56-57.

Under Lewis, Young must show that the trial court abused its discretion in denying his request to engage in limited prehearing discovery. 656 So. 2d at 1250 (quoting Davis v. State, 684 So. 2d 282, 284 (Fla. 3d DCA 1993)). Young has failed to meet that burden. As discussed in the next subissue, the law was well-settled that attorneys generals' notes relating to a case were not public records or were exempt by statute. Since it was the trial court's duty to conduct an *in camera* review of the material, it obviously believed that testimony from the custodian was unnecessary to determine whether the material was, in fact, subject to disclosure. As this Court can see from the sealed materials, the documents contain attorneys' synopses of the original trial record and notes to themselves about the issues raised. The circumstances under which those notes were created were irrelevant to whether they constituted public records. Therefore, the trial court did not abuse its discretion in denying Young's request to

depose the agency's custodian, who was also opposing counsel in this case.

E. Denial of Motion to Compel regarding Attorney General records

This Court can review the sealed documents to confirm that they contain handwritten notes relating to Young's direct appeal and postconviction proceeding. They constitute the attorneys' synopses of the original record and mental impressions of the issues on appeal and in the postconviction proceeding. This Court recently reaffirmed in Johnson v. State, 23 Fla. L. Weekly S161, 161-62 (Fla. Mar. 19, 1998), that an assistant attorney general's work product, i.e., handwritten notes containing mental impressions, is not public record and can never be discoverable. Therefore, the trial court did not err in finding that the agency had properly withheld these documents.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO STRIKE THE STATE'S RESPONSE TO HIS 3.850 MOTION AND ALL OF THE STATE'S PROCEDURAL DEFENSES BECAUSE ITS RESPONSE WAS UNTIMELY (Restated).

When Young filed his original 3.850 motion in May 1993, Judge Lindsey ordered the State to respond within 90 days. (PCR III 452). Because of the State's workload demands, it sought, and was granted, a 60-day extension, making its response due on November 30, 1993. (PCR III 453-54, 455). Because of Young's allegation that he could not fully plead the claims due to public records nondisclosure, the State called a status conference to discuss the public records issue. At that hearing, the State explained that it could not respond to the motion until the parties had resolved the public records issues and Young had filed a final, amended 3.850 motion. (PCR IX 7-12, 28-29, 32-33). The trial court agreed and stayed the State's response until after Young had filed a final, amended motion. (PCR IX 32-33).

At the next status conference in January 1994, Judge Broome had been appointed to the case, and the State once again argued that it could not respond to the 3.850 motion until the parties had resolved the public records issue. (PCR IX 39). Following Judge Mounts' appointment to the case, the parties concluded the public records litigation, and the court allowed Young 60 days to amend

his 3.850 motion. It also allowed the State 60 days from the date of filing to respond. (PCR III 538; XI 395).

Young filed his amended 3.850 motion on February 6, 1995. (PCR IV 594-744). While the State's response was due on April 7, 1995, undersigned counsel added five days for mailing, instead of three days which is appropriate in circuit court, and thus miscalculated her due date to be April 12. On that date, undersigned counsel filed a motion for extension of time, alleging that her response was 99.5% complete, but that a recent illness and other workload demands prevented her from completing the response on time. As is customary, the State called opposing counsel regarding the motion, and he indicated he would respond in writing.[15] (PCR V 773-75).

Opposing counsel, in fact, responded in writing a week later, objecting to the State's request for an additional 20 days. (PCR V 826-31). However, opposing counsel apparently did not provide a courtesy copy to the judge, because the judge granted the State's motion on April 26, 1995, thirteen days after it was filed, noting that it had not received any written response from opposing

---

[15] In a prior pleading, the State had indicated to the trial court that its response was due on April 10. (PCR IV 747). The State arrived at that date by calculating 60 days from the date the State received the amended motion (February 8), as opposed to the date of filing (February 6), which the trial court's order had designated as the starting date (PCR III 538). Contrary to Young's assertion, **brief of appellant** at 60, the State did not "assert[] a false deadline in order to make its extension request timely."

counsel. (PCR V 832). On May 3, 1995, opposing counsel filed a "Motion for Reconsideration" and lambasted the judge for not perusing the clerk's file for his response. (PCR V 779-82). Counsel also set an emergency hearing on his "Motion for Reconsideration" and flew down from Tallahassee to contest the State's motion for extension of time. (PCR XI 429-47). Meanwhile, the State had filed its response on May 4, 1995. (PCR VI 885-1024). Nevertheless, opposing counsel requested at the hearing that the trial court strike the State's response and rescind its order granting the State's "Motion for Extension of Time" because it incorrectly stated that opposing counsel had not filed a written response. (PCR XI 434). After specifically ordering the parties to provide the court with a courtesy copy of every pleading, the trial court denied Young's "Motion for Reconsideration." When asked the grounds for its denial, Judge Mounts replied, "It is judicial discretion." (PCR XI 445-46).

Incredibly, Young now challenges that exercise of discretion on appeal. Specifically, Young claims that the State's response should have been stricken and all of the State's defenses, i.e., procedural bars, found to be waived. **Brief of Appellant** at 58-60. It is well-settled that motions for continuance (or extensions of time) are well within the trial court's discretion. Sliney v. State, 699 So. 2d 662, 671 (Fla. 1997). Here, the State miscalculated its due date by two days, which caused its "Motion

for Extension of Time" to be untimely. After explaining and apologizing for its error, the trial court made a highly discretionary decision not to sanction the State for its error, and denied Young's motion. Given that it took three years to obtain a final, amended 3.850 motion, the trial court obviously believed that an additional 20 days was not an unreasonable amount of time for the State's response. Under the circumstances, the trial court did not abuse its discretion, and this Court should affirm that ruling.

ISSUE V

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S DENIAL OF PART OF CLAIM VII WITHOUT AN EVIDENTIARY HEARING AND THE REST OF CLAIM VII AFTER AN EVIDENTIARY HEARING (Restated).

In Claim VII of his second amended 3.850 motion, Young claimed that his privately retained defense attorney, Craig Wilson, rendered him ineffective assistance of counsel in the guilt phase of his trial. Specifically, Young claimed that (1) defense counsel failed to present the testimony of Elizabeth Painter and Larry Hessmer to bolster his defense of self-defense, (2) either defense counsel failed to discover or the State failed to disclose the existence of Dr. Roth, who would have bolstered his self-defense theory, (3) the State failed to disclose its impression of Trooper Brinker's strength as a witness as reflected in the prosecutor's personal interview notes, (4) the State failed to disclose to defense counsel the prosecutor's specific preparations for trial, including its purpose for interviewing witnesses at the "range," (5) either defense counsel failed to discover or the State failed to disclose that the victim "was especially sensitive" because he believed that someone had previously tried to break into his car, (6) the State failed to disclose to defense counsel a letter written by the victim's sister to the State prior to trial, and (7) defense counsel failed to present evidence "that the victim possessed a character trait for violence and evidence that the victim was the first aggressor." (PCR VII 1167-85). The trial

court summarily denied all but the first allegation, but then denied that allegation after an evidentiary hearing. (PCR VIII 1304-06; PCSR I 110-12). Young claims that the trial court erred in denying these allegations.

In order to prevail on this claim, Young was required to demonstrate that "(1) counsel's performance was deficient and (2) absent the deficient performance there [was] a reasonable probability that the outcome of the proceeding would have been different." Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995). However, if the alleged deficiency was not prejudicial, the trial court did not need to determine if the performance was deficient. Id. Moreover, an evidentiary hearing was not warranted unless Young had shown both deficient performance and prejudice. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

Regarding claims based on the State's alleged failure to disclose information to the defense in violation of Brady v. Maryland, 373 U.S. 83 (1967), Mr. Young was required to show:

> '(1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.'

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

114 S.Ct. 349, 126 L.Ed.2d 313 (1993). See also Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993).

Initially, the State submits that Young's alternatively pled allegations were legally insufficient. Ineffectiveness claims and Brady claims are mutually exclusive. Either the State failed to disclose the information, in which case defense counsel did not have it and could not have obtained it with due diligence, or defense counsel had it (or could have gotten it), but unreasonably failed to use it (or obtain it). In order to obtain an evidentiary hearing, Young was required to make a prima facie showing that all of the ineffectiveness prongs were met **OR** that all of the Brady prongs were met. By pleading in the alternative, he necessarily failed to prove all of the prongs for either one of the claims. Thus, those allegations that were pled in the alternative were legally insufficient and could have been denied on that basis. Roberts v. State, 568 So. 2d 1255, 1259 (Fla. 1990) (affirming summary denial of alternatively pled claims because "[c]ounsel cannot be considered deficient in performance for failing to present evidence which allegedly has been improperly withheld by the state"). To the extent this Court overlooks this pleading deficiency, the allegations raised in this claim were otherwise properly denied.

A. Trial counsel's failure to call Elizabeth Painter and Larry Hessmer as witnesses

Initially, Young claimed that defense counsel failed to call Elizabeth Painter and Larry Hessmer as witnesses to support his defense of self-defense. One of the issues at trial was the order of shots fired. The State presented four witnesses--Christopher Griffiths, Trooper Bricker, Robert Melhorn, and Dana Thomas--who testified that they heard a shotgun blast first, then several pistol shots, and another shotgun blast. (R 2628-31, 2769-74, 2815-22, 2974-81). The State called two of the codefendants, however--Gerald Saffold and Tony Holmes--who testified that the victim shot first. (R 3403-04, 3431-34). Although defense counsel presented no witnesses of his own, he used the codefendants' testimony and his cross-examination of the other witnesses to argue that Young shot the victim in self-defense. (R 3669-96).

Young alleged in his motion that Elizabeth Painter and Larry Hessmer would have corroborated the defense theory of self-defense and that trial counsel was therefore ineffective for failing to call them as witnesses. (PCR VII 1168-74). The State responded that Young failed to prove prejudice, given the State's four witnesses who unequivocally heard pistol shots between two shotgun blasts. It also argued that defense counsel's presentation of Painter's and Hessmer's testimony would not have affected this Court's finding that the evidence supported a conviction for felony murder. (PCR VI 899-900). Despite the State's argument, the trial court held an evidentiary hearing on this claim.

At the hearing, Craig Wilson, Young's trial attorney, testified that he met with Elizabeth Painter prior to trial, and his investigator's invoice indicated that she had been subpoenaed for trial, but he could not recall why he did not call her as a witness. (PCR XII 585-90). Her deposition was consistent with Young's defense of self-defense because she was not sure whether she heard a shotgun blast first. (PCR XII 578-83). Her statement to the police also indicated that she heard small caliber shots first. (PCR XII 585). However, there was a discrepancy between Elizabeth Painter's testimony and Larry Hessmer's testimony regarding the number of small caliber shots fired. (PCR XII 594-95). Hessmer testified at deposition that he was out in the parking lot and heard a small caliber shot first. Although his testimony was also inconsistent with the State's theory, Wilson could not remember why he did not call Larry Hessmer as a witness. (PCR XII 595-606).

On cross-examination, Wilson agreed that the autopsy showed two shotgun blasts to the victim's body; thus, Elizabeth Painter possibly missed the first shotgun blast. (PCR XII 615-16). In Wilson's opinion, Painter was equivocal about the order of shots. (PCR XII 618). Wilson also admitted that Larry Hessmer stated that he was not familiar with guns. Hessmer said that he could not tell the difference between the shots and, in Wilson's opinion, was also equivocal about the order of shots. (PCR XII 619-21).

Larry Hessmer testified that he gave a statement to the Jupiter Police Department several hours after the shooting and a deposition several months later. (PCR XII 637-38). He was not subpoenaed for trial, but would have testified if called. (PCR XII 639-40). His testimony would have been consistent with his deposition and police statement. (PCR XII 638-39).

In response to the trial court's questioning, Hessmer testified that he woke up from a sound sleep around 2:00 a.m. and walked to the sliding glass door. He was on the second floor and his doors were open. He heard movement and screaming, so he went outside to the parking lot. He saw a car with its hood up and three people lying on the ground. (PCR XII 641). He asked the man screaming if he wanted him to call the police, and the man responded affirmatively, so he went back inside his condominium and called 911. He then returned to the parking lot and got to the front corner of the car when the shooting started. He "heard quite clearly" two light shots, but he was not familiar with guns. (PCR XII 642-43). He then heard a loud blast and dove for cover. The hood on the car went down and he heard three clicks. The driver yelled for everyone to get in and they drove off. He did not see who was shooting. (PCR XII 643-44).

Elizabeth Painter (n/k/a Elizabeth Napolitano) testified that she gave a handwritten statement to the police immediately after the shooting, gave an interview to the police later that day, and

gave a deposition sometime later. She was subpoenaed two to four times for trial, but was never called as a witness. (PCR XII 647-50).

In denying this claim, the trial court made the following findings:[16]

> The Defendant's main contention is that Mr. Wilson was ineffective as counsel for failing to call Elizabeth Painter and Larry Hessemer [sic] as witnesses on his behalf. He contends that both witnesses would have testified that the small-arms fire preceded the shot-gun blasts on the night in question and therefore support his claim of self-defense.
>
> First, the Supreme Court of Florida has ruled in this case:
>
> > Young's claim that he could not have been convicted of felony murder because he, himself, had no intention to and did not burglarize the car or, in the alternative, that any attempted burglary had been completed and he was only trying to flee the scene is without merit. The car obviously had been entered without the owner's consent and the admitted purpose of the trip to Jupiter was to find a car to steal . . . The killing culminated this criminal episode . . . Thus, the evidence is also sufficient to support a conviction of felony murder . . . Young v. State, 579 So. 2d 721 (Fla. 1991), at p.724.
>
> Thus, the order of shots and the entire issue of self-defense is irrelevant. Evidence

[16] This order was written by the trial court following the hearing.

> was sufficient to support a felony murder conviction. In essence, it does not matter who fired first. Young was committing a burglary and the victim died during this criminal episode. Whether the victim fired first or Young fired first does not matter.
>
> Second, the depositions and written statements of witnesses Hessemer and Painter were equivocal. Although Hessemer's testimony in particular at the evidentiary hearing was more certain than his prior testimony, he only testified to hearing one shotgun blast. The scientific evidence in this case is uncontroverted that there were two shotgun blasts.
>
> Several witnesses testified at trial concerning the two shotgun blasts in addition to the scientific testimony.
>
> Consequently, this Court finds that had Ms. Painter and/or Mr. Hessemer testified at trial that it would not have made any difference in the jury's verdict or recommendation in sentencing.
>
> In essence, the Court finds that testimony from Ms. Painter and/or Mr. Hessemer would have had no significant impact upon the outcome of this case either in the guilt or sentencing phases of trial.

(PCSR 111-12).

The trial court properly denied this claim. With a claim of ineffective assistance of counsel, the trial court need not determine whether counsel's conduct was deficient if it determines that the defendant was not prejudiced. To prove "prejudice," Young was required to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is

a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984). Young contends in his brief that the trial court applied the wrong standard, i.e., a sufficiency of the evidence standard, and should, instead, have applied the standard explained in Kyles v. Whitley, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Kyles, however, does nothing but reaffirm the standard enunciated in Strickland v. Washington: "In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." 115 S.Ct. at 1569, 131 L.Ed.2d at 510. From the excerpt above, it is clear that the trial court applied this standard, rather than a sufficiency of the evidence standard.

Young next complains that the trial court failed to consider the cumulative effect of all of his evidence in assessing the prejudice prong of his ineffectiveness claim. **Brief of Appellant** at 61-66. None of Young's evidence (whether undisclosed by the State, or undiscovered and unused by the defense) would have had any effect on (much less the reasonable probability of affecting) Young's conviction for felony murder. Self-defense is not a defense to felony murder when the underlying felony, as in this case, is burglary. Marshall v. State, 604 So. 2d 799, 803 (Fla. 1992) ("Under section 776.041(1), Florida Statutes (1987), self-defense is legally unavailable to a person who "[i]s attempting to commit, committing, or escaping from the commission of, a forcible

felony. Section 776.08 specifically defines "forcible felony" to include both burglary and aggravated battery.").

John Bell died during the course of Young's burglary of Bell's automobile. None of Young's allegations, either singularly or cumulative, affect the evidence that supports the felony murder theory. Thus, the trial court's finding was proper.

By this argument, the State does not concede that Young's evidence, singularly or cumulatively, would have affected, within a reasonable probability, Young's conviction for premeditated murder. Craig Wilson testified at the evidentiary hearing that the testimony of Elizabeth Painter and Larry Hessmer was equivocal and inconsistent between the two of them. (PCR XII 594-95, 618, 619-21). After reading the witnesses' depositions and police statements, the trial court also found that their testimony was equivocal. (PCSR I 112). Moreover, both witnesses testified that they heard only one shotgun blast. (PCR XII 615-16, 641-44). The medical examiner, however, testified that the victim received two shotgun blasts. (R 2895-2910). Given this inconsistency, the State would have been able to severely impeach their testimony, since they obviously missed one of the shotgun blasts--perhaps the one that preceded all the other shots. Ultimately, their testimony would have done little to bolster the testimony of the two codefendants, whom the State had called as witnesses, especially

when there were four disinterested bystanders who unequivocally testified that they heard a shotgun blast first.

As for Young's other allegations that counsel failed to use or the State failed to disclose certain evidence, the State submits that such "evidence" was either too speculative, inadmissible, or cumulative and, even collectively, did not prejudice Young's defense.

Finally, as for Young's allegation that the evidence of self-defense could have been presented as a mitigating circumstance in favor of a life sentence, the law does not support such an allegation. Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996) (rejecting defendant's argument that court should have considered and instructed jury on his claim of imperfect self-defense as mitigating circumstance because evidence of residual or lingering doubt of guilt is not appropriate mitigating circumstance). Therefore, the trial court properly found that Painter's and/or Hessmer's testimony "would have had no significant impact upon the outcome of this case" in the penalty phase of trial.

B. Dr. Roth's testimony

In a single paragraph, Young alleged that the State failed to disclose or defense counsel failed to call Dr. Roth as a witness. Young obtained this name from the State Attorney's files. Apparently the prosecutor noted his mental impression of Dr. Roth's testimony on a piece of paper that the State Attorney's Office

disclosed pursuant to Young's public records request. The mental impression was that Dr. Roth was not a good witness because he thought all of the shots were firecrackers. Nevertheless, Young alleged that "the jury was deprived of truthful, important, and critical information." (PCR VII 1175).

First, the State resubmits that this allegation is legally insufficient because Young has alleged mutually exclusive claims. See Roberts, 568 So. 2d at 1259. Second, the record reveals that Dr. Roth was listed in the State's discovery answer (R 4299); thus, counsel could have interviewed Dr. Roth and formed his own mental impression of Dr. Roth's testimony. Third, a prosecutor's mental impression of a witness is not the type of evidence envisioned by Brady. Mental impressions are classic work product that is specifically exempt from disclosure during pretrial discovery. Fla. R. Crim. P. 3.220(g)(1). Finally, Young failed to show how this evidence, either singularly or cumulatively, prejudiced his defense given his conviction for felony murder.

C. Trooper Brinker

Young also obtained from the State Attorney's files a note containing the prosecutor's mental impression of Trooper Brinker. Apparently, the prosecutor believed that he needed to "bolster" Brinker's testimony because the witness did not know initially if he heard gunshots or firecrackers. Trooper Brinker was sitting in his car about a block away from the shooting when he heard the

shots. Young alleged in his motion that the State never revealed its mental impression of Trooper Brinker and never disclosed that it "bolstered" his testimony. (PCR VII 1176-77).

First, Trooper Brinker was listed on the State's discovery answer (R 4275); thus, defense counsel could have deposed Trooper Brinker and formed his own mental impression. Second, as with Dr. Roth, the State's mental impression of Trooper Brinker was exempt from disclosure during pretrial discovery. Likewise, its trial strategy, i.e., that Trooper Brinker's testimony needed to be "bolstered," was exempt from disclosure as well. Finally, Young failed to show that this information, if improperly suppressed by the State and undiscoverable by defense counsel, would have, within a reasonable probability, affected the outcome of his case. Even together with the testimony of Elizabeth Painter, Larry Hessmer, Dr. Roth, and the two codefendants, this mental impression of Trooper Brinker's testimony would not have affected Young's conviction for first-degree felony murder. Thus, this allegation was properly denied.

D. Interviewing witnesses at the "range"

In a single paragraph, Young alleged in his motion that "notes from the State Attorney files reveal that the law enforcement officers and/or the prosecutors in this case brought witnesses to a 'range' or indicated that these witnesses were to be brought to the 'range.'" Apparently, the notes reveal that Dana Thomas,

Christopher Griffiths and Trooper Brinker appeared at the "range," but that unnamed defense witnesses were not. Young conceded, however, that "[i]t is unclear the purpose for these 'interviews' at the 'range.'" (PCR VII 1177-78).

Curiously, Young did not attach a copy of the "notes" to his motion for the trial court to consider. More importantly, Young's allegations were so vague and speculative that he could not even articulate any impropriety on the part of the State. He did not know what the "range" referred to, he did know the State's purpose for interviewing witnesses at the "range," and he did not allege that it was improper for the State to "interview" witnesses at the "range." He merely concluded that the State withheld this information. This conclusion, however, was insufficient to establish a prima facie claim for relief.

To establish a Brady claim, he must show the evidence was, at least, of some impeachment value; that defense counsel did not have the information and could not have obtained it with due diligence, that the State had some duty to disclose it and failed to do so, and that it was material to his defense. Young alleged nothing to prove those prongs. Therefore, this claim was properly denied.

E. Character evidence relating to the victim

Quoting testimony given by the victim's son in a civil suit after Young's trial, Young claimed that the State withheld or defense counsel failed to discover that the victim was "especially

sensitive" to someone breaking into his car because he believed someone had tried to break into it before.[17] (PCR VII 1178-79). In a footnote, however, Young conceded that he did not know whether the State was aware of the information at the time of trial, but that, if it were, it failed to disclose it. Alternatively, Young alleged that, if defense counsel knew about it, he unreasonably failed to use it. Finally, he alleged that, since the information came from testimony after Young's trial, it "may also constitute newly discovered evidence." (PCR VII 1178 n.17 (citations omitted)). This type of alternative pleading epitomizes the gamesmanship inherent in capital postconviction litigation. As noted previously, the elements of an ineffectiveness claim and a Brady claim are mutually exclusive. Given Young's pleading deficiencies, this allegation could have been denied as legally insufficient.

As for Young's claim that the State failed to disclose a letter written to the prosecutor by the victim's sister several months before Young's trial, Young failed to show how this letter would have been admissible at his trial. Even if defense counsel had called the victim's sister as a witness, there is a reasonable

---

[17] Young did not reveal the source of this testimony until his initial brief. Compare **Brief of Appellant** at 73 n.37 with (PCR VII 1178-79). Such deceptive pleading practice prevented the State and the trial court from determining from the record whether defense counsel had it or could have obtained it with due diligence or, alternatively, whether the State had it and unlawfully withheld it.

likelihood that the trial court would have prohibited her from relating the substance of the letter. For example, her justification for why the victim "may have fired the first shot into the ground" is pure speculation, and her details of the victim's heroic efforts may not be based on personal knowledge.

As with Michael Bell's civil trial testimony, Young purposefully failed to identify the document and statement "recently disclosed" to Young that reveal the victim's "history of 'arresting' people and his alleged reputation for violence. By doing so, Young effectively prevented the State (and the trial court) from refuting the allegations with the record. This pleading deficiency resulted in the legal insufficiency of these allegations.

Be that as it may, these allegations were properly denied on their merits. As the trial court found, Young's additional evidence that the victim was aggressive, was "especially sensitive" to the theft of his car, and had a history of apprehending law violators would have been cumulative to the testimony at trial:

> The record is replete with testimony that the victim had a firearm, was screaming obscenities at the four suspects in the car, was very agitated and nervous, threatened to shoot Young and his companions, and was generally very aggressive in his attempt to control the situation and hold the suspects until the police arrived. Such descriptions were used extensively by defense counsel to support his defense of self-defense. Any other evidence that the victim was an aggressive person who was "sensitive" to

> criminal conduct and who had previously made citizen arrests would not have, within a reasonable probability, changed the jury's verdict.

(PCR VIII 1305-06). See Card v. State, 497 So. 2d 1169, 1176-77 (Fla. 1986).

Moreover, as with all of the other additional evidence advanced by Young, evidence of the victim's personality traits would have had no effect on Young's conviction for felony murder. Such evidence, if admissible, would have related only to Young's defense of self-defense, which is only a defense to premeditated murder. Consequently, these allegations were properly denied without an evidentiary hearing.

ISSUE VI

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S SUMMARY DENIAL OF CLAIM V, RELATING TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF APPELLANT'S TRIAL (Restated).

In Claim V of his second amended 3.850 motion, Young claimed that his trial attorney rendered him ineffective assistance of counsel in the penalty phase of his trial. Specifically, Young made the following allegations: (1) trial counsel failed to present to the jury the following witnesses and evidence that he presented to the trial court: (a) his mother's testimony that Young would not do the same thing if he had it to do over again, that neither she nor trial counsel told Young to write letters to his church's congregation, and that Young "would be a different boy" if given a life sentence, (b) Dr. Crown's testimony that Young would function well in a structured environment and then lead a law-abiding life after parole; that Young is immature, has impulsive behavior, and has a learning disability; that Young would mature after spending 25 years in prison; that Young's IQ is in the 30 percentile range; and that the school system rated Young's mental age three or four years below his chronological age, and (c) Deputy Bergman's testimony that Young could conform to prison rules (PCR VII 1152-56); (2) trial counsel never asked Dr. Crown to evaluate him for the purposes of presenting statutory and nonstatutory mental mitigating evidence (PCR VII 1157-59); (3) trial counsel "failed to even request that the jury be instructed on the

statutory mental health mitigating factors" (PCR VII 1159) (emphasis in original); (4) trial counsel failed to present Dr. Crown's testimony relating to the existence of both statutory mental mitigators and the statutory mitigator of age which could have been based on Dr. Crown's "diagnosis of brain damage" (PCR VII 1160-61); (5) trial counsel failed to present evidence to the jury that Young discovered he was adopted when he was 15 years old and evidence which would have explained the impact of this discovery on him (PCR VII 1161); and (6) trial counsel failed to object to numerous comments during the State's penalty-phase closing argument that allegedly prejudiced his right to a fair trial. (PCR VII 1161-65).

In order to prevail on this claim, Young was required to demonstrate that "(1) counsel's performance was deficient and (2) absent the deficient performance there [was] a reasonable probability that the outcome of the proceeding would have been different." Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995). However, if the alleged deficiency was not prejudicial, the trial court did not need to determine if the performance was deficient. Id. Moreover, an evidentiary hearing was not warranted unless Young had shown both deficient performance and prejudice. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

A. The trial court's failure to accept Young's allegations as true

As an initial matter, Appellant repeatedly asserts in his brief that the trial court failed to accept his allegations as true. **Brief of Appellant** at 83, 84, 85, 86, 90. To the extent it did so, the trial court properly refused to accept as true those allegations that were conclusively refuted by the record. See Valle v. State, 22 Fla. L. Weekly S751, 751 (Fla. Dec. 11, 1997) ("[This Court must treat the allegations as true except to the extent they are rebutted conclusively by the record."); Harich v. State, 484 1239, 1241 (Fla. 1986) ("Because an evidentiary hearing has not been held on the ineffective assistance of counsel claims, we must treat Harich's allegations as true except to the extent that they are conclusively rebutted by the record."). For example, Young alleged that Dr. Crown testified before the trial court, and should have been called to testify before the jury, that "Mr. Young suffers from organic brain damage." (PCR VII 1157). The record reveals, however, that Dr. Crown did not testify before the trial court that Young had organic brain damage. Rather, he "found that the significant elements in David's personality were three-pronged: immaturity; some impulsive behavior related to immaturity and what can be categorized as a learning disability or minimal brain dysfunction." (R 4198). Dr. Crown also testified before the trial court that he administered a test "used in the operating room to assist neurological surgeons in pinpointing lesions," which Dr. Crown believed to be "as close to 100 percent accura[te] as we can

find." (R 4201). He gave no indication that the tests results were anything but normal. Thus, Judge Cohen was not required to accept as true Young's characterization of Dr. Crown's testimony as Young having organic brain damage.

Of course, in his brief, Young alleges that Dr. Crown would have testified to such if counsel had had Dr. Crown properly evaluate Young for the penalty phase. **Brief of Appellant** at 90-93. But a close reading of Claims V and XVI reveal no specific factual allegations that Dr. Crown had failed to perform a competent evaluation at the time of trial. Young challenged the competency of Dr. Crown's evaluation in Claim XVI, but presented absolutely no factual allegations to support the claim. Thus, the trial court was not required to accept Young's conclusory allegation in Claim V that Dr. Crown failed to properly evaluate Young for mitigation. In fact, the record showed that Dr. Crown was specifically appointed to evaluate Young for mitigation purposes. (R 4270).

B. Trial counsel's failure to present mitigating evidence to the jury

A week prior to the penalty phase, defense counsel filed a "Motion in Limine," specifically waiving the "no significant history" mitigator and seeking to prohibit the State from introducing any evidence, or arguing, that Young has several convictions for nonviolent offenses. (R 4505-06). Prior to any argument or testimony, defense counsel raised the motion and the State agreed that it would not introduce or mention any prior

nonviolent convictions, unless the defense opened the door. (R 3903-10). The trial court granted the motion, but indicated that it would have to address that issue during the proceedings. (R 3910).

Later that day, still prior to any testimony, the defense reminded the Court that it wanted the parties to proffer any testimony regarding Young's nonviolent convictions. (R 3987-88). After defense counsel proffered the testimony of his penalty phase witnesses, the State warned that "[i]f they ask anything or they slip and say anything about him being a good person, I'm being candid with the Court . . . I definitely think the door would be open, and I would rebut that to show what knowledge they have of him being a good person. . . . I'm going to rebut that with prior convictions." (R 3989-90). Based on defense counsel's proffer of the testimony, the trial court ruled that such testimony would not open the door to the State's rebuttal. (R 3990).

Following the testimony of Catherine Wilbon, the State argued that her testimony--that Young was obedient to her in church--opened the door to impeachment with Young's prior convictions to show that she might not have been aware of his nonobedient criminal behavior. (R 4006-07). The trial court found, however, that her testimony had not opened the door. (R 4007).

Concerned that he might open the door, defense counsel then proffered the testimony of Deputy Hoffstot, who was going to

testify that he had had no problems with Young during Young's year in jail awaiting trial, and that, in his opinion, Young would obey prison rules if given a life sentence. (R 4022-23). The State maintained that it should be entitled to show the jury that Young "[was] not this good, disciplined person that defense counsel [was] trying to portray to the jury." (R 4023). Again, the trial court ruled that the deputy's testimony, if limited to Young's jail conduct, would not open the door to the State's impeachment. (R 4023-24).

Finally, following closing arguments, defense counsel indicated that Young wanted to address the jury. (R 4064). The trial court was inclined to let him do so, but indicated that he would have to testify under oath, "and he would subject himself to cross-examination." (R 4067). The State noted that it "would be able to ask pertinent questions if he's ever been convicted of a felony, [and] how many times." (R 4068). The court then recessed for defense counsel to confer with Appellant. (R 4068). Following the recess, defense counsel indicated, and Young confirmed, that he had decided not to testify. (R 4069).

Despite this record evidence that defense counsel, and Young, were extremely concerned about opening the door to evidence of Young's nonviolent convictions, Young nevertheless alleged in his 3.850 motion that defense counsel unreasonably failed to present to the jury evidence that he presented solely to the judge prior to

sentencing. Specifically, Young claims that defense counsel should have presented Young's mother, who told the court that Young "is a change[d] boy" and that "[h]e wouldn't do it again" if given another chance. (R 4192-94). Young also claims that counsel should have presented the testimony of Dr. Barry Crown, who testified before the court that Young could be a law-abiding citizen after 25 years of structured incarceration; that Young is immature, impulsive, and has a learning disability or minimal brain dysfunction; that Young would mature in a prison's structured environment; that Young's IQ is just below the thirtieth percentile; and that the school system had placed Young's mental age three or four years below his chronological age. (R 4198-99). Finally, Young faults counsel for not presenting the testimony of Deputy Bergman, a correctional officer, who testified before the court that Young had been one of the better inmates he has had to supervise and that, in his opinion, if Young were given a life sentence, he would conform to prison rules. (R 4210-12).

In rejecting these allegations, the trial court made the following findings in its written order denying relief:

> Regarding this allegation, this Court finds that Defendant has failed to prove prejudice under the Strickland standard. During the guilt phase, Defendant's defense was one of self-defense. Defense counsel consistently portrayed the victim as the aggressor who forced Defendant to take defensive action. At the penalty phase, defense counsel sought to portray Defendant as a well-behaved and dedicated church member

with a talent for music, and as a well-behaved inmate who did and would conform to prison rules and regulations if given a life sentence. However, the State was poised for any witness who characterized Defendant as a "good person." (R 3989-91, 4006-07, 4022-24). Had defense counsel presented to the jury the testimony of Defendant's mother and/or Dr. Crown, the State was prepared to introduce, and conceivably could have introduced, evidence of Defendant's six prior felony convictions as impeachment. In fact, when faced with such a possibility in deciding whether to testify on his own behalf, Defendant waived his right to testify. (R 4064-69). Given Defendant's significant prior criminal history, including numerous juvenile offenses, presenting the testimony of Defendant, his mother, Dr. Crown, and Deputy Bergman to the jury would have prejudiced him far more than presenting them only at the sentencing hearing. Since this Court was already aware of Defendant's criminal history, such information had minimal impeachment effect on this Court, but would have had, in all probability, a significantly greater impact on the jury.

Moreover, the jury heard evidence in mitigation that Defendant was adopted, that he attended church and Sunday School regularly as a child/adolescent, that he played piano with the choir, that he taught songs to the other choir members, and that he followed directions well. (R 4001-05, 4009-12). The jury was also given Defendant's letter to the church wherein he acknowledged his guilt and counseled the congregation's youth to stay out of trouble. (R 4012). Finally, the jury heard evidence that Defendant had behaved well in jail while awaiting trial, that he would take advantage of remedial education programs while in prison, and that he would conform to prison rules and regulations if given a life sentence. (R 4012, 4029-30). Despite this evidence, the jury recommended a sentence of death by a vote of ten to two. (R 4538). Having heard the additional evidence presented

> by Defendant at the sentencing hearing, this Court sentenced Defendant to death, finding that Defendant's mitigating evidence did not outweigh the three aggravating factors. Although the supreme court struck the CCP aggravating factor on direct appeal, this Court finds that there is no reasonable probability that the jury's recommendation or this Court's ultimate sentence would have been different had defense counsel presented the additional evidence to the jury. Therefore, these allegations of ineffective assistance of counsel are hereby denied. Cf. Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992).

(PCR VIII 1299-1301).

The record supports the trial court's ruling. Deputy Bergman's testimony would have been cumulative to that of Deputy Hoffstot, who testified before the jury that Appellant had not caused him any problems while in jail awaiting trial and that, in his opinion, Appellant could conform to prison rules if given a life sentence. (R 4029-30). Thus, defense counsel cannot be deemed ineffective for failing to present cumulative evidence. Card v. State, 497 So. 2d 1169, 1176-77 (Fla. 1986).

As for counsel's failure to present Appellant's mother and Dr. Crown before the jury, the record reveals that trial counsel was aware of such evidence; after all, counsel presented it to the judge. Obviously, trial counsel had a reason for not presenting these witnesses to the jury. While such a reason or tactical strategy should normally be revealed at an evidentiary hearing, the record in this case plainly and unambiguously reveals why counsel

did not present these witnesses for the jury to consider.[18] The record is very clear that counsel and Young were concerned about the admission of Young's six prior nonviolent convictions. Thus, counsel cannot be deemed ineffective for preventing the admission of harmful testimony. See 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. 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.").

---

[18] This Court has affirmed the summary denial of other ineffectiveness claims where the record conclusively revealed counsel's strategy. See, e.g., Engle v. Dugger, 576 So. 2d 696 (Fla. 1991) (affirming summary denial of claim where record reflected that defense counsel had adopted a tactical approach not to question the medical examiner's conclusions in order not to inflame the jury); Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990) (affirming summary denial of numerous ineffectiveness claims where record revealed that counsel either adequately did these things or that it was a tactical decision not to do so); Smith v. State, 565 So. 2d 1253, 1255 (Fla. 1990) (affirming summary denial of ineffectiveness claim, finding that "failure to develop eyesight evidence may have been the result of a reasonable strategic decision to concentrate on other matters"); Provenzano v. State, 561 So. 2d 541, 545 (Fla. 1990) (affirming summary denial of ineffectiveness claims where counsel made "obvious tactical decisions"); Melendez v. State, 612 So. 2d 1366, 1368 (Fla. 1992) (affirming summary denial of ineffectiveness claim where court "[had] no reason to believe that the decision to forego further cross-examination was not a tactical decision.").

On appeal, Young contends that evidence of his prior convictions were not admissible during the penalty phase because they did not establish the "prior violent felony" aggravator, and because the defense waived the "no significant history" mitigator. But if Young had opened the door by presenting evidence of his "good character," the State could have impeached these witnesses with evidence of Young's prior convictions. Testimony by Young's mother that Young "wouldn't do it again" if given another chance, and testimony by Dr. Crown that Young would lead a law-abiding life after parole would certainly open the door to evidence that Young's six prior convictions did not alter his criminal propensities or "rehabilitate" him. See Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988); Pangburn v. State, 661 So. 2d 1182, 1190 (Fla. 1995).[19] Moreover, this Court has repeatedly held that the State may elicit a defendant's criminal history from defense mental health experts if the expert relied on same in formulating his or her opinion. Thus, to the extent Dr. Crown used Young's past behavior to forecast his future behavior, the State could have elicited evidence of Young's criminal convictions. See Johnson v. State,

---

[19] Though not cited by Young, the State acknowledges Geralds v. State, 601 So. 2d 1157, 1161-63 (Fla. 1992), but believes, despite some broad language in the opinion, that impeachment with nonviolent convictions can be used if a proper predicate is laid. See id. at 1162 ("Accordingly, the State was not entitled to impeach Wilson by inquiring into his knowledge of Geralds's criminal record because no predicate was laid for such impeachment.").

608 So. 2d 4, 10-11 (Fla. 1992), cert. denied, 113 S. Ct. 2366, 124 L. Ed. 2d 273 (1993); Muehleman v. State, 503 So. 2d 310, 315 (Fla.), cert. denied, 484 U.S. 882 (1987); Parker v. State, 476 So. 2d 134, 139 (Fla. 1985). Finally, as with evidence of lack of remorse, which is strictly forbidden unless the defense opens the door, evidence of prior convictions should be admissible to correct a misimpression left by the defense that Young will not recidivate. Cf. Wuornos v. State, 644 So. 2d 1000, 1009-10 (Fla. 1194) ("Once the defense argues the existence of mitigators, the State has a right to rebut through any means permitted by the rules of evidence, and the defense will not be heard to complain otherwise." (footnote omitted)); Cruse v. State, 588 So. 2d 983, 991 (Fla. 1991) (finding that defense opened door to evidence of lack of remorse).

The trial court did not need an evidentiary hearing to determine that the admission of such damaging evidence would have had a significant impact on the jury. Nor did it need an evidentiary hearing to determine, within a reasonable probability, that the evidence it heard would not have changed the jury's ten to two recommendation. In its original sentencing order, the trial court made the following findings regarding Appellant's mitigating evidence of good prison conduct and rehabilitation:

> [T]he defendant's argument that he should receive a life sentence because he can conform to prison rules and regulations while awaiting trial in the county jail is, likewise, simply

> far outweighed by any one aggravating circumstance that has been proven to exist beyond a reasonable doubt. The defendant's presentation to the Court that the defendant's ability to mature and conform to normal social behavior if released from prison after 40 years of age is a mitigating factor is [sic] so speculative so as to have no real present meaning.

(R 4568). As for Dr. Crown's testimony regarding Young's mental capacity, the trial court stated the following:

> The defendant's evidence regarding his alleged learning disability or minimal brain dysfunction (and resulting poor judgment), offered by Dr. Barry Crown, simply does not conform to the evidence in this case. After all, the defendant at a relatively young age was fairly accomplished on the piano and doing wonderful Church activities. His communication skills are reflected in his letter to the Church congregation soon after his arrest.

(R 4569). As the United States Supreme Court reasoned in Sochor v. Florida, 504 U.S. 527, 538 (1992), it is likely that a jury will disregard an option unsupported by the evidence. In other words, there is a reasonable probability that the jury would have been as unpersuaded by Mrs. Young's and Dr. Crown's testimony as was Judge Cohen. Thus, the trial court's rejection of this claim was proper.

C. Trial counsel's failure to present evidence and seek instructions on mental mitigation

Likewise, the trial court properly denied Appellant's allegations that trial counsel was ineffective for (1) failing to ask Dr. Crown to evaluate him for the purposes of presenting statutory and nonstatutory mental mitigating evidence, (2) failing

to present Dr. Crown's testimony to the jury as to the existence of both statutory mental mitigators and the significance of mental age which could have been based on Dr. Crown's "diagnosis of brain damage," and (3) failing to request instructions relating to the two statutory mental mitigators.

Appellant was indicted for first-degree murder on September 19, 1986. Less than two weeks later, defense counsel moved for the appointment of Dr. Crown as a confidential mental health expert. He sought Dr. Crown's appointment to "perform the necessary tests to help reach an opinion in this case as it may deal with the Defendant's state of mind at the time of the commission of the crime and/or addressing the issue of mitigation at the sentencing segment of the case should the Defendant, in fact, be found guilty of premeditated murder as contained in Count I of the Indictment." (R 4337-38). The trial court granted the motion a week later, appointing Dr. Crown. (R 4270). Thus, contrary to Appellant's assertion, trial counsel specifically sought Dr. Crown's appointment to address issues in mitigation. Moreover, the record reveals that defense counsel had initially intended to call Dr. Crown during the penalty phase, and had Dr. Crown sit through the testimony of the other penalty phase witnesses. (R 3988, 4197-98). As discussed previously, counsel obviously made a strategic decision not to present his testimony to the jury.

Be that as it may, Young maintained that defense counsel failed to ensure that Dr. Crown conducted a competent evaluation and then failed to present Dr. Crown's complete conclusions. Curiously, in Claim XVI, Young alleged that "the mental health experts who evaluated him during the trial court proceedings failed to conduct professionally competent and appropriate evaluations." (PCR VII 102). Young alleged absolutely no factual allegations to show that Dr. Crown performed an incompetent evaluation. In fact, Young alleged absolutely no factual allegations whatsoever in this claim. Thus, he could hardly allege in Claim V that Dr. Crown failed to perform an adequate evaluation.

Nevertheless, Young alleged that, "had [Dr. Crown] been asked to conduct a complete examination," he would have been able to testify that Young had brain damage, which supported the existence of two statutory mental mitigators, and he "would also have been able to fully explain to the jury the significance of the mental age mitigating factor." (PCR VII 1160). Despite the pleading deficiency of this claim, the trial court nevertheless assessed the merits of this claim as follows:

> The record reveals . . . through Dr. Crown's testimony at the allocution hearing, that he (Dr. Crown) interviewed Defendant for two hours and performed two mental status tests on him, one of which is used by neurological surgeons to pinpoint lesions on the brain. (R 4200-01). In relating evidence of mental mitigation, the most Dr. Crown could say about Defendant was that he was immature, had impulsive behavior related to his immaturity,

> and had "what could be characterized as a learning disability or minimal brain dysfunction." (R 4198). Dr. Crown did not, as Defendant asserts, diagnose him as having "brain damage." It is obvious to this Court that Dr. Crown did not find any evidence to support the existence of either mental mitigator, or else he would have testified to their existence at the allocution hearing.

(PCR VIII 1301-02).

Given the record in this case--that counsel moved for the appointment of Dr. Crown immediately upon his own retention, that counsel expressly sought such appointment to assess mitigation, that counsel initially intended to call Dr. Crown as a witness, and that counsel did, in fact, present Dr. Crown at the allocution hearing--it is unreasonable to accept Young's allegations as true. If Dr. Crown had, in fact, diagnosed Young with brain damage, and had, as a result, found the existence of both statutory mental mitigating factors, there is no reasonable basis upon which to believe that counsel simply forgot to present such testimony, even to the judge. In the trial court's opinion at the time of sentencing, Appellant "was represented by an experienced privately retained trial lawyer of excellent ability." (R 4570). And as Strickland v. Washington, 466 U.S. 668, 689 (1986), indicates, "[j]udicial scrutiny of counsel's performance must be highly deferential." Having presided over Young's trial, Judge Cohen was able to accurately assess counsel's competence and apply the

requisite measure of deference. The record supports the trial court's denial of these allegations.

As for Young's allegation that defense counsel failed to seek instructions on the statutory mental mitigating factors, the trial court found that, "since no evidence was presented to support the giving of instructions on either mental mitigator, defense counsel cannot be considered deficient for failing to seek instructions on them." (PCR VIII 1302). This ruling was also proper. See Stewart v. State, 549 So. 2d 171, 174 (Fla. 1989) ("Florida Standard Jury Instructions state that the jury be instructed only on those factors for which evidence has been presented."); Nixon v. State, 572 So. 2d 1336, 1344 (Fla. 1990).

Finally, as for Young's assertion that Dr. Crown would have been able to fully explain the significance of the mental age mitigator, Young failed to explain the substance or significance of Dr. Crown's purported testimony. Regardless, as noted above, Judge Cohen heard Dr. Crown testify that the school system (not Dr. Crown) had estimated Young's mental age three or four years below his chronological age.[20] (R 4199). The judge also heard Dr. Crown explain why he focused on Young's age as a mitigating factor:

> A [By Dr. Crown] Age is a critical element because it relates to the maturity of the personality, an individual's ability to

---

[20] If true, this would have placed Young's mental age at 16 or 17 years of age at the time of the murder, which is hardly significant.

> reason, to exercise judgment, to act in appropriate manner as age increases.
>
> Although it's impossible to make a statistical predication, we do know that with age there is a decrease in acting out behavior and that the cutoff point seems to be at about age 40.
>
> Q [By defense counsel] Did this particular factor . . . indicate anything significant in terms of the history you had from David and which you knew about David?
>
> A I had learned that he was adopted. I had learned that he had had learning problems in school and that he was in many respects quite immature and quite impulsive.

(R 4203-04).

Regarding the age mitigating factor, Judge Cohen rejected Dr. Crown's testimony at sentencing:

> First, although the defendant argues his age of twenty at the time of the offense should be considered in mitigation, the Court cannot find this to be a mitigating circumstance under all the facts and circumstances known to the Court. The defendant was not an immature twenty. He had a prior adult record of burglary, grand theft, fraudulent use of a credit card and dealing in stolen property. . . . The defendant has shown no diminished capacity at the time of the alleged offense. He was a street wise twenty year old who acted with a purpose and after reflection.

(R 4567).

Again, having heard Dr. Crown's testimony regarding Young's alleged lower mental age, the trial court determined that such testimony would not have, within a reasonable probability, changed

the jury's recommendation. Young, whose burden it is to prove otherwise, has failed to meet his burden. Therefore, this Court should affirm the trial court's rejection of this claim.

D. Evidence of adoption

As for Mr. Young's allegation that defense counsel failed to present evidence to the jury that he discovered his adoption at 15 years of age, the trial court made the following findings in denying relief:

> Next, Defendant alleges that trial counsel was ineffective for failing to present evidence of Defendant's discovery at age 15 that he was adopted, and evidence which would have explained the impact of this discovery on him. First, the record reveals that both Ms. Wilbon and Mr. Carlisle testified before the jury that Defendant was brought to church by his adoptive parents. (R 4002, 4010). Thus, the jury was aware that Defendant had been adopted, and that Defendant was aware of his own adoption. Second, and more importantly, Defendant has failed to show how evidence of his own discovery of his adoption would have, within a reasonable probability, changed the jury's ten-to-two death recommendation and this Court's ultimate sentence of death. Thus, Defendant having failed to establish prejudice, this allegation is hereby denied.

(PCR VIII 1302).

The trial court properly denied this claim. Young faults trial counsel for failing to present evidence to the jury that he (Young) discovered he was adopted six years before this murder and the effect that discovery had on him. (PCR VII 1161). Young failed to allege, however, what effect the discovery had on him.

He claimed that Dr. Crown could have explained the "devastating impact," but he never described what that testimony would have included. "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." Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

Nevertheless, Young failed to show how counsel's conduct, if deficient, prejudiced his defense. As he concedes, the jury was aware that Young was adopted. (R 4002, 4010). Judge Cohen, who presided over Young's trial and heard Young's mitigation, acted well within his discretion in finding that Young's awareness of his adoption and reaction to it would not have, within a reasonable probability, affected the jury's recommendation or his ultimate sentence. Therefore, this Court should affirm the trial court's ruling.

E. Failure to object to closing argument

Finally, as for Young's allegation that defense counsel failed to object to several of the State's comments during its penalty-phase closing argument, the trial court made the following findings in denying this claim for relief:

> Finally, Defendant alleges that trial counsel was ineffective for failing to object to numerous comments during the State's penalty-phase closing argument which allegedly prejudiced his right to a fair trial. This Court finds this allegation procedurally barred. Defendant could have challenged the State's comments on direct appeal, and may not escape the bar by restyling the issue as one of ineffective assistance of counsel. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).
>
> Regardless, Defendant has failed to show prejudice. In Jackson v. State, 522 So. 2d 802, 808-09 (Fla. 1988), upon which Defendant relies, the supreme court found similar, though not identical, comments improper, but it did not find the comments sufficiently egregious to taint the jury's recommendation. "'In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial.'" Id. at 809 (quoting Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985)). Although the supreme court later vacated a death sentence in Taylor v. State, 583 So. 2d 323, 329-30 (Fla. 1991), based on similar comments by the State, it did so because the State consistently ignored the court's Jackson opinion, and because it could not say that the offending argument was harmless under the facts of that case. Both Jackson and Taylor issued after Defendant's trial. Regardless, as in Jackson, the State's comments in Defendant's case were not so egregious as to warrant a new sentencing proceeding. Therefore, this allegation is hereby denied.

(PCR VIII 1303).

The trial court properly denied this claim. All of the alleged prosecutorial misconduct appears in the direct appeal record. Young could have and should have challenged the comments

on direct appeal. Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995). To overcome the procedural bar, Young challenged the comments under the guise of ineffective assistance of counsel. However, this Court has repeatedly stated that "[a] procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel." Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990); Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (same). Therefore, as the trial court found, this claim was procedurally barred and properly denied as such.

If for some reason the bar does not apply, the trial court properly found that Young failed to prove prejudice. Given the highly subjective nature of closing argument and the high standard for reversal based on prosecutorial misconduct, defense counsel's failure to object cannot be deemed per se unreasonable. In other words, it cannot be said that no reasonable attorney under the circumstances would have waived an objection to the State's comments. Cf. Ferguson v. State, 593 So. 2d 508, 511 (Fla. 1992) (affirming denial of allegation that counsel failed to object to state's closing argument, noting that "[t]he decision not to object is a tactical one."). Moreover, the comments, though similar to those in Jackson and Taylor, if erroneous, were harmless beyond a reasonable doubt in the context of this case. Thus, counsel cannot be faulted for failing to raise a nonmeritorious claim. See Chandler v. Dugger, 634 So. 2d 1066, 1067 (Fla. 1994).

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIM XXI, RELATING TO SELECTION OF THE PETIT JURY VENIRE (Restated).

In Claim XXI of his second amended 3.850 motion, Young alleged that his petit jury venire was not a fair cross-section of the community because it was drawn from the voter registration list in Palm Beach County. (PCR VII 1223-31). In summarily denying this claim, the trial court made the following findings:

> Claim XXI, relating to Defendant's allegation that he was denied a fair trial because his petit jury was chosen from a voter registration list which under-represented nonwhites, and thus his jury did not contain a fair cross-section of the community, fails to relate sufficiently specific facts to state a claim for relief. Cf. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Moreover, this issue could have and should have been raised on direct appeal. Thus, it is procedurally barred. Chandler v. Dugger, 634 So. 2d 1066, 1067 (Fla. 1994). Regardless, the State's method of selecting juries from voter registration lists has repeatedly been upheld. E.g., Chandler, 634 So. 2d at 1068 n.3; Hendrix v. State, 637 So. 2d 916, 920 (Fla. 1994) ("[T]his Court has previously ruled that voter registration lists are a permissible means of selecting venirepersons, even where minor variations between the number of residents and registered voters exist. Bryant v. State, 386 So. 2d 237 (Fla. 1980)."). Therefore, this claim is hereby denied.

(PCR VIII 1310-11).

The record supports the trial court's ruling. Other than conclusory allegations, Young provided no record or statistical support for his claim. Rather, Young alleged that "[w]ithout an

evidentiary hearing [he could not] fully plead this claim." (PCR VII 1231). He also claimed that the State was withholding public records that would somehow support this claim. (PCR VII 1231). As with other claims for relief, a defendant may not simply make conclusory allegations and expect an evidentiary hearing. Cf. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Moreover, as the trial court found, Young could have and should have raised this claim on direct appeal. Thus, it was properly denied as procedurally barred. Cf. Chandler v. Dugger, 634 So. 2d 1066, 1067 (Fla. 1994). Finally, this Court has previously rejected similar claims. E.g., Robinson v. State, 23 Fla. L. Weekly S85, 88-89 (Fla. Feb. 12, 1998); Chandler, 634 So. 2d at 1068 n.3; Hendrix v. State, 637 So. 2d 916, 920 (Fla. 1994) ("[T]his Court has previously ruled that voter registration lists are a permissible means of selecting venirepersons, even where minor variations between the number of residents and registered voters exist. Bryant v. State, 386 So. 2d 237 (Fla. 1980)."). Since Young failed to allege any facts or circumstances that would warrant reconsideration of this claim, the trial court properly denied it alternatively on the merits.

On appeal, Young alleges that, "without a tactic or strategy, counsel unreasonably failed to challenge the method of jury pool selection, and the lower court erred in failing to afford an evidentiary hearing." **Brief of Appellant** at 96. No where in Claim

XXI of his 3.850 motion did Young allege the ineffective assistance of counsel. Thus, he cannot make it for the first time on appeal. Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Regardless, counsel cannot be deemed ineffective for failing to raise a nonmeritorious claim. See Chandler, 634 So. 2d 1068. This Court should affirm the trial court's ruling.

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY DENIED AS PROCEDURALLY BARRED CLAIM VIII, RELATING TO THE PROPRIETY OF PENALTY-PHASE JURY INSTRUCTIONS (Restated).

In Claim VIII of his second amended 3.850 motion, Young alleged that the trial court improperly instructed his sentencing jury that mitigating factors must outweigh aggravating factors, which shifted the burden to Young to prove that life imprisonment was the appropriate penalty. (PCR VII 1186-89). In denying this claim, the trial court made the following findings:

> Claim VIII, relating to Defendant's allegation that the jury instructions improperly shifted the burden to him to prove that the mitigating factors outweighed the aggravating factors, is procedurally barred, since it could have been raised on direct appeal. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Defendant may not escape the bar by merely claiming that his trial attorney was ineffective for failing to raise a proper objection. Id. In any event, Defendant has failed to prove deficient conduct or prejudice since this claim has been previously raised and rejected in other cases. E.g., Brown v. State, 565 So. 2d 304, 308 (Fla. 1990) ("[T]he standard instructions [do not] impermissibly put any particular burden of proof on capital defendants."), cert. denied, 498 U.S. 992 (1991).

(PCR VIII 1306).

The record supports the trial court's ruling. This is a classic procedurally barred claim. Young's single-sentence, conclusory allegation that, "[t]o the extent that counsel failed to object, Mr. Young received the ineffective assistance of counsel,"

(PCR VII 1189), was legally insufficient to overcome the procedural bar. See Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990) ("A procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel."). Regardless, this Court has repeatedly rejected this claim, e.g., Brown v. State, 565 So. 2d 304, 308 (Fla. 1990); therefore, counsel cannot be deemed ineffective for failing to raise a nonmeritorious claim. See Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994). This Court should affirm the trial court's ruling.

ISSUE IX

WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S SUMMARY DENIAL AS LEGALLY INSUFFICIENT OF CLAIM IV, RELATING TO APPELLANT'S CLAIM THAT HE IS INNOCENT OF FIRST-DEGREE MURDER (Restated).

Young framed Claim IV of his second amended 3.850 motion as one of actual innocence, but alleged that he could not plead this claim fully until the State disclosed its improperly withheld documents. Thus, Young's claim contained only two paragraphs. (PCR VII 1147). In denying this claim, the trial court found that it was legally insufficient on its face because it lacked sufficient factual and legal support. (PCR VIII 1298).

On appeal, Young now has three and a half pages of argument on the merits of this claim. **Brief of Appellant** at 98-101. It is well-settled, however, that a defendant may not raise arguments on appeal that were not made in the trial court. Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Therefore, these arguments were not properly preserved for appeal.

Regardless, Appellant does nothing more than re-argue his direct appeal claims that the evidence was insufficient to support a conviction for first-degree murder under either a premeditated or felony murder theory. This Court rejected those arguments on direct appeal. Young v. State, 579 So. 2d 721 (Fla. 1991). Appellant may not use his 3.850 appeal as a second direct appeal on

this issue. See Zeigler v. State, 654 So. 2d 1162 (Fla. 1995) (finding "actual innocence" claim procedurally barred). Therefore, this Court should affirm the denial of this claim.

ISSUE X

WHETHER APPELLANT PRESERVED FOR REVIEW HIS CLAIM THAT HE IS INNOCENT OF THE DEATH PENALTY (Restated).

In this appeal, Appellant frames this issue as "Mr. Young is innocent of the death penalty." He alleges that he is innocent of the death penalty because (1) neither the "pecuniary gain" nor the "avoid arrest" nor the "felony murder" aggravators were proven at trial, (2) the "avoid arrest" aggravator was overbroadly applied because the trial court did not apply the limiting construction, (3) the "avoid arrest" instruction was vague and overbroad, and (4) his sentence is disproportionate. **Brief of Appellant** at 101-08. Young made no such claim in his 3.850 motion. Thus, the trial court was not given the opportunity to consider these arguments as Young has presented them to this Court. Since Appellant failed to preserve this issue for review, this Court should deny this claim. Tillman v. State, 471 So. 2d 32 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

As in Issue IX of this appeal, Appellant is merely re-arguing direct appeal issues--some of which he did raise and some of which he could have raised. Appellant challenged the "avoid arrest" finding and proportionality. This Court rejected both arguments. Young v. State, 579 So. 2d 721, 724 (Fla. 1991). He could have, but did not, challenge the "pecuniary gain" and "felony murder" aggravators and/or their instructions. He may not, however, use

postconviction (more specifically the appeal therefrom) to relitigate these claims. Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994).

ISSUE XI

WHETHER THE TRIAL COURT PROPERLY DENIED AS LEGALLY INSUFFICIENT CLAIM XXIX, RELATING TO APPELLANT'S ALLEGED INABILITY TO INTERVIEW WITHOUT THE COURT'S PERMISSION THE JURORS IN HIS CASE (Restated).

In Claim XXIX of his second amended 3.850 motion, Young alleged that an unspecified ethical rule prevented his collateral counsel from interviewing his trial jurors, and thus chilled his ability to investigate possible misconduct. He wanted the trial court to "declare this ethical rule invalid . . . and to allow [him] unfettered discretion to interview the jurors in this case." (PCR VII 1247-47A). In denying this claim, the trial court made the following findings:

> In Claim XXIX, Defendant claims that Florida Rule of Professional Conduct 4-3.5(d)(4) restricted his collateral counsel's ability to investigate and raise claims which prove his conviction and sentence invalid, and sought this Court to declare this ethical rule invalid and to allow him unfettered discretion to interview the jurors in this case. This Court finds that the Defendant has failed to plead a claim for relief under Rule 3.850. The Rules are promulgated by the Florida Supreme Court to regulate members of the Florida Bar. The Defendant is not a member of the Bar. Therefore, the Defendant does not have standing to challenge the applicability of a rule that does not govern him directly. Moreover, the law allows juror interviews under certain circumstances. See Fla. R. Civ. P. 1.431(h). The Defendant's inability to meet the requirements of this rule does not render his attorney exempt from the rules of professional conduct, nor does it render his conviction and sentence constitutionally

> infirm. Therefore, this claim is hereby denied.

(PCR VIII 1312-13).

The trial court properly denied this claim. As it noted in its written order, 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 Young 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 XII

WHETHER THE TRIAL COURT PROPERLY DENIED CLAIM VI, RELATING TO THIS COURT'S HARMLESS ERROR ANALYSIS AFTER STRIKING THE CCP AGGRAVATOR (Restated).

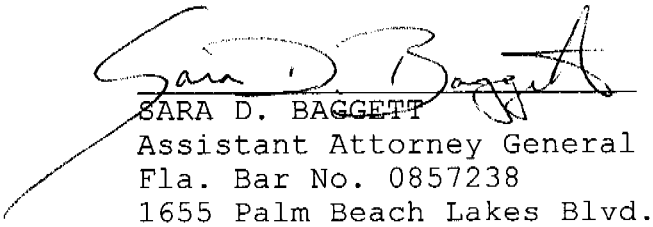
In Claim VI of his second amended 3.850 motion, Young claimed that this Court had failed to perform an adequate harmless error analysis after striking the CCP aggravator. (PCR VII 1165-67). The trial court denied the claim, finding that it was not a cognizable claim for relief. (PCR VIII 1303-04). The trial court's ruling was proper. In Hardwick v. Dugger, 648 So. 2d 100, 103 (Fla. 1994), this Court affirmed the denial of an identical claim, holding that the trial court has no authority to review the actions of this Court. As in Hardwick, this Court should affirm the denial of this claim.

CONCLUSION

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

Respectfully submitted,

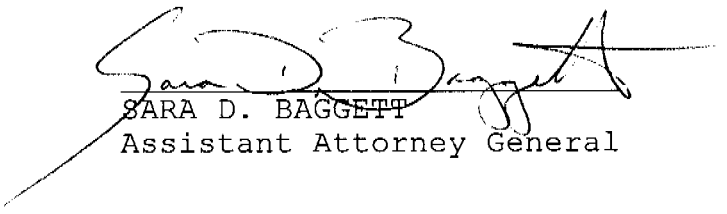
ROBERT A. BUTTERWORTH
Attorney General



SARA D. BAGGETT
Assistant Attorney General
Fla. Bar No. 0857238
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

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, Office of the Capital Collateral Regional Counsel, 1444 Biscayne Boulevard, Suite 202, Miami, Florida 33132-1422, this 21st day of April, 1998.



SARA D. BAGGETT
Assistant Attorney General

Appendix A

IN THE CIRCUIT/COUNTY COURT OF THE
15TH JUDICIAL CIRCUIT
PALM BEACH COUNTY, FL
(CRIM. DIV.)

CASE NO. 86-8682CFA02

Defendant David Young

ITEM: Copy of letter to David Bludworth & letter to Barry Krischer both from Jeffrey Walsh

Filed by the: STATE / (DEFENSE) / COURT

FOR IDENTIFICATION, as Exhibit 15

this date

ADMITTED INTO EVIDENCE

this date NOV 30 1994

Dorothy H. Wilken, Clerk
Circuit/County Court

By _____ D.C.

1-93

CCR
State of Florida

1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376
(SC) 277-4376
(FAX) (904) 487-1682
(FAX) (SC) 277-1682

Larry Helm Spalding
Capital Collateral Representative

April 1, 1993

The Honorable Barry Krischer
Office of the State Attorney
Fifteenth Judicial Circuit
401 North Dixie Highway
West Palm Beach, Fla 33401

Re: **Public Records Request** - DAVID YOUNG

Dear Mr. Bludworth:

The Office of the Capital Collateral Representative (CCR) currently represents DAVID YOUNG in post-conviction matters. This is a formal request for access to public records pursuant to Section 119.01 et seq., Florida Statutes (1985).

We ask that you provide the Office of the CCR with a certified copy of any and all files related to Mr. Young, or grant us immediate access to inspect and copy any and all state attorney files (regardless of form and including, all photographs and sound or video recordings) regarding any cases in which Mr. Young was accused, charged, and/or convicted. This request also includes all cases in which Mr. Young was a witness or victim. Mr. Young is a black male with a date of birth of 10-08-65.

This request is made in connection with post-conviction proceedings. If your office claims any exemptions to this request, please provide us with an itemized list of materials withheld.

Please contact my office when these files are ready. Thank you for you kind assistance in this matter,

Sincerely,

Jeffrey Walsh
CCR Investigator

CCR
State of Florida

1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376
(SC) 277-4376
FAX) (904) 487-1682
FAX) (SC) 277-1682

Larry Helm Spalding
Capital Collateral Representative

April 13, 1993

The Honorable Barry Krischer
Office of the State Attorney
Fifteenth Judicial Circuit
401 North Dixie Highway
West Palm Beach, Fla 33401

Re: **Public Records Request**

Tony Richard Holmes, B/M, 06-21-70
Jon French, B/M, 06-16-61
Johnnie Lee Allen, B/M, 07-31-67
Clifford L. Leonard, B/M, 09-22-69
Lorenzo N. Pugh, B/M, 12-26-63
Ricky D. Underwood, 02-07-63
Wesley Hinson, B/M, 03-04-69
Gerald L. Saffold, B/M, 10-30-70
Jerrold L. Harris, B/M, 01-25-71
Jacquline L. Green, B/F, 11-15-64
Elizabeth Painter, W/F, 04-08-54
Diane Griffiths, W/F, 12-28-38
Larry Hessmer, W/M, 08-03-29
Dana L. Thomas, W/F, 06-29-73

Dear Mr. Krischer:

This is a formal request for access to public records pursuant to Section 119.01 et seq., Florida Statutes (1985).

We ask that you provide the Office of the CCR with a <u>certified</u> copy of <u>any</u> and <u>all</u> files related to the above listed individuals, or grant us immediate access to inspect and copy any and all state attorney files (regardless of form and including, all photographs and sound or video recordings) regarding any cases in which the above listed individuals were accused, charged, and/or convicted. This request also includes all cases in which these same individuals were a witness or victim.

This request is made in connection with post-conviction proceedings. If your office claims any exemptions to this request, please provide us with an itemized list of materials withheld.

RECEIVED BY

AUG 0 9 1995

CAPITAL COLLATERAL
REPRESENTATIVE

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. CIVIL ACTION.

CASE NO. CL 95-4898 AD

DAVID YOUNG,

Plaintiff,

vs.

OFFICE OF THE STATE ATTORNEY, FIFTEENTH JUDICIAL CIRCUIT, State of Florida, and BARRY E. KRISCHER, as State Attorney for the Fifteenth Judicial Circuit of Florida,

Defendants.
_____/

ORDER GRANTING MOTION TO STRIKE COMPLAINT AS A SHAM PLEADING

This matter was before the Court on August 7, 1995 upon the Motion to Strike Pleading (the Complaint) as a Sham Pleading. The Plaintiff was represented by Todd G. Scher, Esquire and Defendants were represented by J. Brian Brennan, Esquire.

The Court has reviewed the Complaint, Motion to Strike as a Sham Pleading, and Plaintiff's Response to Motion to Strike as a Sham Pleading, and having heard the argument of counsel for the respective parties, and being fully advised in the premises finds the the Defendants' Motion is well taken. It is, thereupon,

ORDERED, ADJUDGED AND DECREED as follows:

1. The Complaint filed in this matter is hereby stricken as a sham pleading pursuant to Rule 1.150, Fla. R. Civ. P.

Appendix B

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida this ____ day of August, A.D., 1995.

CIRCUIT JUDGE

SIGNED AND DATED
AUG - 7 1995
JUDGE MOSES BAKER

Copy furnished:

Todd G. Scher, Esquire
Assistant CCR
1533 South Monroe Street
Tallahassee, FL 32301

J. Brian Brennan, Esquire
Assistant State Attorney
401 North Dixie Highway
West Palm Beach, FL 33401

DC
95-14196

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
JANUARY TERM 1997

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL

JAN 15 1997

CRIMINAL OFFICE
WEST PALM BEACH

DAVID YOUNG,

Appellant,

v.

OFFICE OF THE STATE ATTORNEY, FIFTEENTH JUDICIAL CIRCUIT, State of Florida, and BARRY E. KRISCHER, as State Attorney for the Fifteenth Judicial Circuit of Florida,

Appellees.

CASE NO. 95-2961

Opinion filed January 15, 1997

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Moses Baker, Jr., Judge; L.T. Case No. CL 5-4898 AD.

Todd G. Scher, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Sara D. Baggett, Assistant Attorney General, West Palm Beach, for appellees.

PER CURIAM.

Affirmed on the authority of Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979).

POLEN, PARIENTE and GROSS, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appendix C

SID J. WHITE, CLERK
Supreme Court of Florida
500 SOUTH DUVAL STREET
TALLAHASSEE 32399-1927
(850) 488-0125

Ms. Sara D. Baggett
Office of Attorney General
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33409

4/23/98

DAVID YOUNG
v.
STATE OF FLORIDA

CASE NO. 90,207

I have this date received the below-listed pleadings or documents:

Answer Brief of Appellee (original & 7 copies)

Appellant's reply brief shall be served on or before June 25, 1998. If counsel does not intend to serve a reply brief, please notify this Court in writing prior to the above date.

Per this Court's Administrative Order In re: Filing of Briefs in Death Penalty Direct and Post-Conviction Relief Appeals dated October 15, 1997, counsel are directed to include a copy of all briefs on 3-1/2 inch diskette in Word Perfect 5.1 or higher format or ASCII text format. **PLEASE LABEL ENVELOPE TO AVOID ERASURE.**

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Clerk, Supreme Court

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

SJW/tsc
cc: Mr. Todd Scher