IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,207

DAVID YOUNG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT I

"A postconviction motion simply does not require the same quality or quantity of independent contemplation and weighing of evidence as does a sentencing order."

(AB at 20-21) (emphasis added).[1] This statement by an Assistant Attorney General of this State should give this Court serious pause. Mr. Young's counsel knows of no hierarchy of cases whereby certain cases are due "less" attention by a court as compared to others. Notwithstanding the stage in which it is being litigated, a capital case is deserving of the most strict attention and contemplation by every court, trial or appellate.[2] For an Assistant Attorney General to aver that the decision to grant or deny a postconviction motion in a death case is not due a high level of contemplation and weighing by a court is more

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[1]References to the Answer Brief shall be "AB at ___" and references to Mr. Young's Initial Brief shall be "IB at ___."

[2]This Court does not believe that postconviction cases are entitled to less quality and quantity of judicial scrutiny. The Court recently promulgated Fla. R. Jud. Admin. 2.050 (b)(10), which requires that all judges assigned to handle capital trial and postconviction cases serve a minimum of six (6) months in a felony criminal division and successfully complete the "Handling of Capital Cases" course offered through the Florida College of Advanced Judicial Studies within the last five (5) years. Moreover, the Court has not hesitated to reverse orders of circuit courts in postconviction cases where justice, due process, and this Court's precedent so required notwithstanding the State's position here that such orders are not of sufficient importance to merit due consideration and weight by the lower courts. See, e.g. Hoffman v. State, 571 So. 2d 449 (Fla. 1990); Rose v. State, 601 So. 2d 1181 (Fla. 1992); Rose v. State, 675 So. 2d 567 (Fla. 1996); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995); Smith v. State, 708 So. 2d 253 (Fla. 1998); Mordenti v. State, ___ So. 2d ___ (Fla. 1998); Rivera v. State, ___ So. 2d ___ (Fla. 1998).

than troubling.[3]

In defense of its practice, the State argues that "[t]rial judges simply do not take the time to make detailed findings in postconviction cases" and that "the State merely wanted to spur the trial court to conclude its function properly by making factual findings" (AB at 21) (emphasis in original). These statements are stunning for an Assistant Attorney General to be making.[4] Under the State's otherworldly view of our legal system, why bother having judges at all?[5] After all, if the State believes it can "spur" the courts to "conclude [their] function properly" by writing orders in capital cases, perhaps the entire system can be bypassed, and once served with a Rule 3.850 motion, the State can write an order, get a judge to sign it, and the State will have in its arsenal "a sufficient basis for appellate/federal review" for all these cases. If trial judges do not "take the time" to write detailed orders in capital cases and have to be "spurred" by the State to "properly" perform their function, there is something wrong with the system, and

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[3]Mr. Young's counsel cannot imagine that the State would maintain this indefensible position had the lower court granted relief to Mr. Young. Most assuredly the State would argue that the lower court failed to adequately consider and weigh the evidence.

[4]Oddly, the State has no complaints about the lower court's ability to "conclude its function properly" when it denied relief following the limited evidentiary hearing.

[5]Of course, the State makes no such complaints about lower court orders when credibility findings are made against defense witnesses following an evidentiary hearing and instead argues that such findings are due the utmost deference. See, e.g. Blanco v. State, 702 So. 2d 1250 (Fla. 1997).

this is not something that can be remedied by having the State write orders in capital cases. A postconviction judge is not just a cog in a system designed to give the State whatever it wants.

The State argues that its proposed order, adopted by the lower court over Mr. Young's objection,[6] "accurately reflected the facts and the law relating to this case" (AB at 20). In reality, the State's proposed order reflected only the facts that the State wanted the trial court to find and only the law that the State wanted the trial court to follow, and the State's brief makes no attempt to establish otherwise. The order is not "worth the paper [it is] written on as far as assisting [this Court] in determining why the judge decided the case." United States v. El Paso Natural Gas Co., 376 U.S. 651, 657 n.4 (1964). The Court only knows why the State believes that relief should not be granted.

It is inconceivable that the State can argue before this Court that its proposed order "accurately reflected" the law relating to proving materiality of a Brady violation without one citation to United States v. Bagley, 473 U.S. 667 (1985), or Kyles v. Whitley, 514 U.S. 419 (1995), which are the two cases

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[6]The State complains that Mr. Young made no objection to "the procedure" of proposed orders (AB at 19). Mr. Young's counsel could not imagine that the State would submit a proposed order which would materially misrepresent the facts and the law. In contrast, Mr. Young's proposed order was a one-page proposal simply granting a hearing (Supp. PC-R. 107). Once Mr. Young's counsel saw the State's order, he did object, as the State acknowledges. Id.

which define "materiality" for Brady purposes according to the United States Supreme Court. Mr. Young's motion cited Bagley several times (PC-R. 1182; 1185), and when Kyles was decided in 1995, it was submitted as supplemental authority to the lower court (PC-R. 833). The State's proposed order, signed by the lower court, cited no caselaw for materiality and then applied an erroneous materiality analysis.

Mr. Young's initial brief outlined the numerous factual and legal misrepresentations set forth in the State's order. For example, Mr. Young explained that the State's order "found" that trial counsel had a strategy for not presenting mental health evidence at the penalty phase and "found" no prejudice under Strickland[7] (IB at 43). The State's Brief is curiously vacant of any explanation of the legal propriety of a trial court's finding of a strategy when there has been no evidentiary hearing and when the allegation is not conclusively rebutted by the record. Such a finding, of course, is wholly improper without an evidentiary hearing. See, e.g., Bartley v. State, 23 Fla. L. Weekly D943, 944 (Fla. 1st DCA April 9, 1998) (whether a sound tactical decision was made by trial counsel "is generally inappropriate absent an evidentiary hearing"). In an opinion authored by then-Judge Pariente of the Fourth DCA, it was correctly noted that "[t]he state's conclusory arguments that trial counsel's failures to object were reasonable strategic decisions cannot support affirmance of a summary denial and

[7]See Strickland v. Washington, 466 U.S. 668 (1988).

substitute for an evidentiary hearing." Davis v. State, 648 So. 2d 1249, 1250 (Fla. 4th DCA 1995). While a strategic decision may refute a claim of ineffectiveness, "without an adequate record, we are in no position to make such a fact-based determination . . ." Id. at 1250.

The State's brief also fails to explain the legal propriety of a trial court's failure to accept as true the factual allegations in Mr. Young's Rule 3.850 motion. For example, the order contained a "finding" that Dr. Barry Crown did not diagnose Mr. Young with brain damage (PC-R. 1301-02), whereas Mr. Young's Rule 3.850 motion expressly alleged that Dr. Crown did diagnose Mr. Young with brain damage but "[b]ecause of trial counsel's prejudicially deficient performance, Dr. Crown only testified to a minute portion of the mitigation which was available had he been asked to conduct a complete examination of Mr. Young's case" (PC-R. 1160). Notwithstanding what the State puts in a proposed order, a trial court is not free to dispute allegations pled in a Rule 3.850 motion and still summarily deny it. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). The State's attempt to refute the factual allegations contained in Mr. Young's motion established that an evidentiary hearing was required. Because the allegations "involve disputed issues of fact," an evidentiary hearing was and is necessary. Rivera v. State, ___ So. 2d ___ (Fla. 1998); Valle v. State, 705 So. 2d 1331 (Fla. 1998); Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996); Way v. State, 630 So. 2d 177 (Fla. 1993). The State's actions call to mind the recent

concurrence by Justice Wells, joined by Justice Pariente, who wrote that "[t]oo much judicial and counsel time and resources have been wasted in determining whether to hold an evidentiary hearing." Mordenti v. State, ___ So. 2d at ___ (Fla. 1998) (Wells, J., concurring, in which Pariente, J., joined).

The State argues that "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" (AB at 21). The State further avers that "[t]his method of denying relief has been commonplace in capital cases and has heretofore not created controversy" (Id.). The State is wrong, and cites to no case wherein this "practice" is either "commonplace" or acceptable. It is flatly improper for a court to deny a Rule 3.850 motion by simply incorporating the State's response. As the Second District Court of Appeals recently observed, "[t]he growing practice of incorporating state responses into court orders denying postconviction motions is not [a] substitute for the record attachments necessary in many cases for the trial courts to be affirmed." Flores v. State, 662 So. 2d 1350, 1352 (Fla. 2d DCA 1995). See also Loomis v. State, 691 So. 2d 34 (Fla. 2d DCA 1997) (to support a summary denial under Rule 3.850, "the rule contemplates more than attaching a copy of the state's response which has no supporting record attachments"); Jackson v. State, 566 So. 2d 373 (Fla. 4th DCA 1990) (reversing summary denial of Rule 3.850 motion because

"[t]here were no attachments to the court's order other than the state's response to the petition"); Rowe v. State, 588 So. 2d 344 (Fla. 4th DCA 1991) (reversing summary denial of Rule 3.850 motion because "[t]here was no evidentiary hearing and the only attachment to the order of denial was a copy of the state's response"). And not only is it improper for a state's response to be incorporated into an order denying Rule 3.850 relief, it is also "inappropriate for the state to designate which records refute defendant's allegations." Smothers v. State, 555 So. 2d 452 (Fla. 5th DCA 1990).

The State also defends the lower court's failure to attach portions of the record because the order "cited to those pages of the record that support its ruling" (AB at 22). However, the State completely overlooks the fact that the State wrote the order. "[I]t is inappropriate for the state to designate which records refute defendant's allegations." Smothers, 555 So. 2d at 452; Oehling v. State, 659 So. 2d 1226, 1228 (Fla. 5th DCA 1995) (same). These cases were clearly cited in Mr. Young's brief, but are neither mentioned nor distinguished by the State. The State wants to completely avoid a trial court's participation in postconviction proceedings so it can do whatever it wants to produce what it believes to be a sufficient order denying relief in these case without affording the defendant an opportunity to prove his case at an evidentiary hearing. Reversal is warranted.

ARGUMENT II

The State claims that no improper ex parte communication

occurred in this case because the State communicated only with Judge Cohen's judicial assistant and the scope of the conversation was limited to the status of Mr. Young's Motion for Rehearing. The State explains that it feared Judge Cohen had not received the motion because he had until that time been extremely diligent in resolving Mr. Young's Rule 3.850 motion while he had not issued an order on the Motion for Rehearing three weeks after it was filed. The State's "explanation" is insufficient to excuse its improper conduct in this case. The State could have satisfied its curiosity in ways that do not violate the Rules of Professional Conduct and this Court's precedent prohibiting ex parte communication between a party and a judge (such as setting a status hearing, as is usually done).[8] The State also fails to address the impropriety of Judge Cohen's conduct as the recipient of the ex parte communication. The Code of Judicial Conduct prohibits a judge from either initiating or receiving ex parte communication. The actions of both the Attorney General's Office and Judge Cohen were improper. Mr. Young's due process rights were denied.

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[8]That the ex parte contact regarding the merits of Mr. Young's case was made with the judge's assistance cannot make the State's actions acceptable. Litigants and courts cannot get around the prohibition against ex parte contact by using a judge's assistant as a go-between, as the State's position here sanctions. A judge's staff is not immune from the canons and legal requirements that cover judicial behavior. See Porter v. Singletary, 49 F. 3d 1483, 1489 (11th Cir. 1995) (holding that requirement of litigants to investigate impartiality of judge and judge's staff "would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process -- all to the detriment of the fair administration of justice").

Counsel also objects to the State's unsupported implication that counsel for Mr. Young engaged in ex parte communication with Judge Mounts. The State claims that counsel stated at the public records hearing that Judge Mounts had requested copies of certain pleadings and then assumes without any factual support that this was a result of an ex parte communication (AB at 25 n.6). Had the State reviewed its files in this case, however, it would have noted that there was a hearing before Judge Mounts on April 13, 1994, before Judge Mounts in his chambers.[9] Counsel's notes from the hearing reflect that the undersigned and Ms. Judith Dougherty were present on behalf of Mr. Young, and Assistant Attorney General Sara Baggett appeared for the State. At the hearing, Judge Mounts, who had been appointed following the recusal of Judge Broome, requested that Mr. Young's counsel prepare a folder for him containing all the pleadings that had been submitted in the case, including the direct appeal opinion and the pleadings regarding public records. Judge Mounts also requested that the State provide him with the record on appeal. The State's accusations are false. Reversal is warranted.

ARGUMENT III

A. THE SHERIFF'S DEPARTMENT

Sergeant Hess destroyed all of the physical evidence in this case on April 2, 1993. The State defends this improper action by

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[9]Inexplicably this hearing was not transcribed and made part of the record. Counsel has contacted the court reporter and will make this transcript part of the record as soon as it is received.

noting that although central records received a public records request dated April 1, Sergeant Hess did not receive a request from Mr. Young's counsel until April 27. The Sheriff's Department violated public records law when it destroyed physical evidence despite a request that had been made for the records.

The State's response is inadequate to defend the Sheriff's Department. Sergeant Hess admitted that he was unfamiliar with Chapter 119 and that he relied on Section 705.105, Florida Statutes, when he destroyed the physical evidence in Mr. Young's case. Hess ignored the clear language of Chapter 119 which includes tapes, photographs, and other physical evidence within the definition of public records. Instead, Hess relied on a statute that applies to "lost or abandoned property." The bulk of the State's response to this argument is a summary of the improper procedures employed by the Sheriff's Department in regard to physical evidence. The State seems to argue, as it surely would not in any other context, that ignorance of the law is a defense:

> 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. . . . Clearly, chapter 119 cannot override the protocol for the maintenance of important physical evidence for use at a trial.

(AB at 32). The State admits that the Sheriff's Department ignored Chapter 119 and the definition of public records that includes the physical evidence that was destroyed but suggests that the Department's policy trumps Florida public records law.

Regardless of the Department's desire to maintain chain of custody, State agencies are not free to ignore the established laws of this State and adopt internal policies that impose a lesser duty to retain public records. The State simply cannot defend the Sheriff's Department's unauthorized destruction of evidence.[10]

B. THE STATE ATTORNEY'S OFFICE

As the State has repeatedly argued, the State Attorney's Office provided 6,990 pages in response to Mr. Young's public records requests. However, the number of pages provided, no matter how large, does not prove that an agency is in full compliance. At the request of the State Attorney's Office, counsel filed a Motion to Compel identifying by case number and defendant the files that had not been disclosed despite the State Attorney's production of 6,990 pages. As the State admits in its Answer Brief, Assistant State Attorney Paul Zacks "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" (AB at 34)(emphasis added). Mr. Young's counsel reviewed the records provided by the State Attorney's Office and filed the Motion to Compel only because the agency failed to provide all of the requested records. However, Judge Mounts chose to believe Mr. Zacks, who "could not say whether he provided those specific case files," rather than counsel for Mr.

[10]Mr. Young urges this Court to consider the Department's deliberate ignorance of Chapter 119 as evidence of the bad faith that the State argues Mr. Young is unable to prove (AB at 31).

Young, who unambiguously stated that the files had not been received. Judge Mounts' denial of the Motion to Compel, in light of Mr. Zacks' inability to assure the court that his office had fully complied with Mr. Young's requests, can only be understood in the context of his disquisition on the "doctrine of delay in capital cases" in which he criticized post-conviction defense counsel in general, and counsel for Mr. Young specifically. Judge Mounts' belief that defense counsel engages in protracted public records litigation as a strategy to delay capital cases is the only explanation, though an invalid one, for his denial of Mr. Young's Motion to Compel. See Argument IIIC.

The State argues that Judge Mounts "made the decision to deny the motion to compel" (AB at 36). However, in reality, Judge Mounts delegated the responsibility of this decision to the State. Contrary to the State's representations of what occurred at the public records hearings, Judge Mounts did not "thoughtfully" consider Mr. Young's Motion to Compel; rather, he denied it despite the State Attorney's inability to state, let alone prove, that his office was in compliance. The record reflects anything but a "thoughtful" review of Mr. Young's public records requests, as Judge Mounts simply told the State to make the decision for him:

> THE COURT: . . . I call upon the State. I can deny that request [to compel production of records] and deny them further litigation on this point, if the State Attorney General and the State Attorney want to live with that ruling and let it go up on appeal later on.
>
> I will give you that opportunity to say,

"Yes, Judge, deny it and we will live with the appeal."

The ball is in your court. I don't want to play games but I don't want to get reversed. My job is not to get reversed.

* * *

THE COURT: If I should deny them further litigation on this point, is the Attorney General and the State Attorney who you are sort of representing now, will you live with that and face the Supreme Court on appeal?

* * *

THE COURT: If the State wants to say, "Judge, deny them that," I am letting you. I cannot say with great clarity of conviction that I know the answer to this. But I am sort of indicating to you that I might just deny them further litigation on this point.

I just want you to accept part of the responsibility. It is my responsibility, I am the ruler, I know that the person making the ruling, but we will take five minutes or so and see what happens when I come back.

(T. 399-402). Following the recess, the Attorney General stated that "the State would stand by the decision to deny them any further relief on this particular claim in their motion to compel" (T. 403), after which Judge Mounts told Mr. Young's counsel that "I am not ruling that you are not entitled, I am just denying your motion. You can put into that whatever you want to and we will let the Appellate Court do the same" (T. 403-04).

After urging the lower court below to deny Mr. Young any further litigation on this issue, the State on appeal makes the most disingenuous of arguments -- that Mr. Young "has been able since that time to file supplemental requests under Chapter 119,

Florida Statutes, for those specific case files" and admits that if he does so and if he discovers new information, he can "file a successive 3.850 motion and obtain relief" (AB at 36-37). Apparently the State's position is that Mr. Young should violate the lower court's order denying him further litigation on this point. Mr. Young did all that he could, in fact he did more. He first filed an interlocutory appeal in this Court from Judge Mounts' order denying the motion to compel. In moving to dismiss the appeal, the State argued that Mr. Young "has a remedy. Following the disposition of his motion to vacate, he may challenge the trial court's denial of his motion to compel. If the trial court erred, then the case will be remanded, and Mr. Young's motion to compel will be granted" (State's Motion to Dismiss Appeal, Case No. 84,959, 1/17/95). Mr. Young then filed a civil suit against the State Attorney's Office, which was opposed by that office and which was dismissed by the lower court and affirmed by the appeals court. Young v. Office of the State Attorney, 685 So. 2d 1042 (Fla. 4th DCA 1997). When he amended his Rule 3.850 motion and included the allegation that he still did not have the listed files from the State Attorney's Office, the State's position in its responsive pleading was that "[s]ince the issue has already been litigated and resolved, such a request is not cognizable as a claim for postconviction relief. Therefore, this Court should summarily deny the claim as legally insufficient" (State's Response to Amended Motion to Vacate at 3-4). Of course, a claim alleging noncompliance with Chapter 119

is cognizable in a Rule 3.850 motion, as this Court recently reaffirmed in Mordenti v. State, ___ So. 2d ___ (Fla. 1998) ("Contrary to the trial court's findings in the order denying postconviction relief, public records requests are cognizable in a rule 3.850 motion").

Under the ruling by Judge Mounts, there was no mechanism for Mr. Young to file "supplemental requests" under Chapter 119. Fla. R. Crim. P. 3.852, which does provide for supplemental requests, was not in effect at the time Mr. Young's case was pending in the lower court. Further, the rule provides that for cases already pending upon promulgation, "[t]he rule shall not be a basis for renewing requests that have been previously initiated or for relitigating issues pertaining to production of public records upon which a court has ruled." Fla. R. Crim. P. 3.852 (i)(1). The State's acknowledgement that supplemental requests could have been made is flatly contradictory to its position until now, and the State is estopped from making contradictory arguments from one appeal to the next. Kaufman v. Lassiter, 616 So. 2d 491, 493 (Fla. 4th DCA), rev. denied, 624 So. 2d 267 (Fla. 1993). The acknowledgement that supplemental requests could have been filed is a concession that the files requested by Mr. Young were not turned over, or at a minimum that there is a factual dispute which must be resolved at an evidentiary hearing. Reversal is warranted.

C. MOTIONS TO DISQUALIFY JUDGE MOUNTS

The State defends Judge Cohen's denial of Mr. Young's claim

regarding Judge Mounts as moot. The issue of Judge Mounts' bias against Mr. Young, as revealed in his accusations against his counsel, is not moot because Judge Mounts presided over Mr. Young's public records hearings and then denied his Motion to Compel. Judge Mounts' actions have denied Mr. Young access to public records to which he is entitled under this Court's precedent thereby precluding him from fully pleading the claims that entitle him to relief. Although Judge Mounts is no longer presiding over Mr. Young's post-conviction proceedings, that fact alone does not render this claim moot.

The State also defends Judge Mounts' commentary on the delay of capital cases, noting that "Judge Mounts was obviously frustrated with the process, but patiently and painstakingly presided over Young's proceeding. . . . While he may have ruled against Young on occasion, he thoughtfully considered every motion and request" (AB at 38). Because Judge Mounts acknowledged that his denial was contrary to the law, the only explanation for his denial is his bias against Mr. Young. The State's reliance on Nassetta v. Kaplan, 557 So. 2d 919, 921 (Fla. 4th DCA 1990), in which the court noted that "[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," minimizes the nature of Judge Mounts' comments that were the basis for the motion to disqualify. Judge Mounts did not merely express that he was "not impressed" with counsel for Mr. Young; his commentary about delay in capital cases revealed a deep-seated bias against

defense counsel which caused him to ignore that it was the State's refusal to supply records that caused any delay in Mr. Young's case. Mr. Young's fear that he could not receive a fair hearing before Judge Mounts was confirmed when his Motion to Compel was denied despite the State Attorney's inability to tell the court that his office was in full compliance. See Argument IIIB.

D. THE ATTORNEY GENERAL'S OFFICE

Citing Johnson v. State, 23 Fla. L. Weekly S161 (Fla. Mar. 19, 1998), the State argues that an assistant attorney general's notes can never be discoverable because they are not public records. Contrary to the State's argument, notes are not automatically exempt from disclosure.[11] The State also ignores that in Johnson this Court reaffirmed that exemptions from disclosure under Chapter 119 must yield to a defendant's right to receive Brady material and that "this obligation [to disclose Brady material] exists regardless of whether a particular document is work product or exempt from chapter 119 discovery." The State's response ignores that the thrust of Mr. Young's argument is that Judge Mounts made no findings regarding the claimed exemptions and did not address the legal issues presented by Mr. Young, including the State's duty to disclose Brady material regardless of whether an exemption may otherwise apply.

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[11]The exemption claimed by the Attorney General's Office in Johnson applied only to notes containing "mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency." Section 119.07(3), Fla. Stat.

Reversal is warranted.

ARGUMENT V

Citing Roberts v. State, 568 So. 2d 1255 (Fla. 1990), the State argues that Mr. Young cannot plead his ineffective assistance of counsel and Brady claims in the alternative because "[b]y 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" (AB at 49)(emphasis in original).

First, the State failed to raise this argument below and it is therefore waived. Procedural bars apply equally to the State. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). In its response to Mr. Young's Rule 3.850 motion, the State made no such argument about the claims pled in the alternative, but rather addressed those claims and argued that they should be summarily denied. At the Huff hearing, the State made no such argument about pleading in the alternative, nor did it include such an argument in the order it wrote for the lower court. Thus this argument about any putative pleading deficiency is waived and thus barred.

Moreover, the State's argument has been repeatedly rejected by this Court. For example, in Haliburton v. Singletary, 691 So. 2d 466 (Fla. 1997), this Court faced an identical claim where the defendant "claims that either the state suppressed certain exculpatory evidence . . . or his counsel was ineffective". The

Court addressed the claim with no concern. The Court granted Rule 3.850 relief in State v. Gunsby, 670 So. 2d 920 (Fla. 1996), based on an identical claim. See also Smith v. Wainwright, 777 F. 2d 609 (11th Cir. 1985), cert. denied, 477 U.S. 905 (1986). In Roberts, the Rule 3.850 motion alleged both that material found in the State Attorney's file was not provided to trial counsel and that trial counsel was ineffective for failing to use that material to impeach a trial witness. This Court noted that "[c]ounsel cannot be considered deficient for failing to present evidence which allegedly has been improperly withheld by the state." Roberts, 598 So. 2d at 1259. As in Roberts, Mr. Young has raised both an ineffective assistance of counsel claim and a Brady claim; however, Mr. Young has clearly distinguished the evidence supporting each claim and has not alleged both that the State withheld and that trial counsel failed to use the same piece of evidence.[12]

The State defends the circuit court's denial of relief

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[12]Mr. Young's Brady claim is based on the State's failure to disclose notes about the need to bolster Trooper Brinker, notes about Dr. Roth's statement, and notes about interviews with State witnesses at "the range." His ineffective assistance of counsel claim is based on Mr. Wilson's failure to present character evidence about the victim and his failure to call Ms. Painter and Mr. Hessemer to testify about the order of shots fired. In regard to Dr. Roth and some of the character evidence, Mr. Young alleged that either the State withheld notes about his potential testimony or trial counsel unreasonably failed to call him as a witness, the same way the claim was alleged in Haliburton and Gunsby. The State's characterization of this as a "pleading deficiency" and "gamesmanship" misrepresents Mr. Young's claims and the facts of this case and is also barred because it was never raised below. This is a proper way to plead claims. Haliburton; Gunsby; Smith v. Wainwright.

following the evidentiary hearing on the grounds that Mr. Young failed to prove that he was prejudiced by his trial counsel's failure to call Mr. Hessemer and Ms. Painter as trial witnesses.[13] In response to Mr. Young's claim about trial counsel's failure to present evidence of the victim's propensity for violence and aggression, the State argues that this evidence would have been cumulative to evidence presented at trial and would have had no effect on Mr. Young's conviction for felony murder. The State offers the following arguments in response to Mr. Young's Brady claim: that the notes about Dr. Roth and Trooper Brinker were not Brady material because their names were included in the State's discovery and because the notes are nondiscoverable attorney work product and that the claim regarding the interviews at the range is too speculative to warrant a hearing. The State also argues that Mr. Young cannot prove that he was prejudiced by the State's failure to disclose this evidence.

Relying on Marshall v. State, 604 So. 2d 799 (Fla. 1992), the State argues that Mr. Young cannot prove that he was

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[13]In its discussion of the evidentiary hearing on the failure of trial counsel to call Painter and Hessemer as witnesses, the State notes that "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" (AB at 55). An accurate review of Mr. Young's brief would show, however, that Mr. Young challenged the lower court's use of the wrong standard in his discussion of the circuit court's failure to grant a hearing on the Brady claim. The lower court denied the Brady claim using a sufficiency-of-the-evidence standard, which is expressly rejected by the Kyles Court. See IB at 77-79.

prejudiced by his trial counsel's ineffectiveness and the State's Brady violations because self-defense is not an available defense to first-degree felony murder.[14] However, under Section 776.041(2)(a), Fla. Stat., self-defense is available to a felony murder charge if the force used by the victim "is so great that the [defendant] reasonably believes that he or she is in imminent danger of death or great bodily harm and that he or she has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm to the assailant." Contrary to the State's argument, self-defense is available for felony murder if the requirements of Section 776.041(2)(a) are met.

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[14]Mr. Young was initially charged with second-degree murder (R. 3217). Detective Murray, who wrote the probable cause affidavit, testified that this was the result of a misunderstanding, and the charge was later changed to first-degree murder (R. 3243-44). During the charge conference, Judge Cohen repeatedly asked the State Attorney whether an instruction on third-degree felony murder should be included with grand theft auto as the underlying felony, concluding that "I think it is error in this case not to give third degree murder and the felony being grand theft or attempt to do the grand theft" (R. 3060-71). The State Attorney initially argued that because Mr. Young was not charged with attempted grand theft auto but only with burglary of a conveyance (which is an underlying felony for first-degree felony murder), the jury should not be instructed on third-degree felony murder (R. 3066-68). The only evidence proving burglary of a conveyance was Michael Bell's testimony that he saw his sneakers, which had been in his father's car, in Mr. Young's car when he viewed it at the police station. The sneakers were not included in the inventory of Mr. Young's car and were not produced at trial. Michael Bell's testimony on its own is insufficient to prove burglary of a conveyance, and, as a result, Mr. Young should not have been charged and convicted of first-degree felony murder because the State failed to prove an enumerated felony.

The State's current position about self-defense also ignores the trial record. At the charge conference, Judge Cohen stated that "[t]he big issues are going to be over the justifiable use of force and self defense," (R. 3057), explaining that the jury instructions "should state the issue in this case is whether or not the fellow acted in self-defense" (R. 3115). The jury was given the following instruction on self-defense:

> An issue in this case is whether the defendant acted in self-defense. It is a defense to the offense with which David Young is charged if the death of Clarence John Bell resulted from the justifiable use of force likely to cause death or great bodily harm.
>
> A person is justified in using force likely to cause death or great bodily harm if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another.
>
> However, the use of force likely to cause death or great bodily harm is not justifiable if you find: One, David Young was attempting to commit, committing, or escaping after the commission of burglary of a conveyance, or two, David Young initially provoked the use of force against himself, unless, A, the force asserted toward the defendant was so great that he reasonably believed that he was in imminent danger of death or great bodily harm, and had exhausted every reasonable means to escape the danger other than by using force to cause the death or great bodily harm to Clarence John Bell, B, in good faith the defendant withdrew from physical contact from Clarence John Bell and indicated clearly to Clarence John Bell that he wanted to withdraw and stop the use of force likely to cause death or great bodily harm, but Clarence John Bell continued or resumed the use of force.

(R. 3834-34A).

The facts of this case, as proved by the State's witnesses and those presented at the evidentiary hearing who did not testify at trial, reveal that Mr. Young acted in self-defense.

Mr. Young and three teenaged friends (Gerald Saffold, Gerald Harris, Tony Holmes) were attempting to steal Mr. Bell's car in the parking lot of an apartment complex; when they heard noise from a nearby apartment, they returned to their own car (R. 2244-46). The evidence at trial showed that Mr. Bell approached Mr. Young's car, pointed his revolver at Mr. Young, and ordered Mr. Young and his three teenaged friends to get out of the car and lie on their stomachs in the parking lot (R. 2247-48). Saffold testified for the State that Mr. Young picked up his weapon only after Bell pointed his revolver at Mr. Young's face and threatened to shoot him; Mr. Young did not point his weapon at Bell through the windshield (R. 3357). Holmes also testified for the State that when Bell reached the car, "[h]e put the gun on David. He told us if he were going to shoot he would shoot David." (R. 3429). As Young got out of the car, Bell "grabbed David and put [his gun] to his head and he said 'If any one of you niggers run, I'm going to kill David. I am going to shoot him in the head.'" (R. 3447-48). Mr. Bell's son Michael testified that Mr. Young wanted to leave the scene, but Mr. Bell ordered the boys out of the car at gunpoint (R. 2298). Michael Bell also testified that "[t]he passenger hesitated on getting out of the car and my dad kind of leaned down and aimed the gun at the defendant, and said, 'Get out of the car now or I will shoot your friend.'" (R. 2299) Mr. Young, who was already out of the car, encouraged his friends to obey; Michael Bell testified that "[t]he person that was laying on the ground said, 'Get out

of the car, man. Listen to it. Just get out of the car.'" (R. 2400). Once the four boys were on their stomachs in the parking lot, Mr. Bell repeatedly threatened to shoot Mr. Young in the head if any of them moved (R. 2248). At some point, Mr. Bell shot into the ground toward Gerald Harris after the boy turned his head slightly; Harris then ran from the scene and Mr. Bell fired two more shots toward him (R. 2262). Mr. Young fired once from the ground, hitting Bell; he then ran around the other side of the car (R. 2262). With his gun pointed at Mr. Young, Bell ordered him to move from around the car; Mr. Young fired a second shot (Id.).

The State's witnesses also provided testimony regarding Mr. Bell's demeanor during the incident: Michael Bell testified that his "father's voice was elevated and he was screaming" (R. 2400); Christopher Griffiths, a neighbor, testified that he heard Bell say "'If you move I will blow your head off,' and 'Motherfucker,' amongst other expletives that I really can't recall, but that was not the only one. It was a whole conversation of them." (R. 2624); another neighbor, Robert Melhorn, confirmed that Bell was yelling and threatening to shoot and that he heard Bell say "Don't move, mother fucker, or I will shoot you" three or four times (R. 2837). At his deposition, Melhorn commented on Bell's threats that "I am thinking to myself, you know, you only say so much to somebody, somebody is going to drastically break loose in a minute, you know." (R. 2840). Larry Hessemer, who did not testify at trial, described Bell's actions in his deposition:

Bell "called them niggers . . . [and] he was shouting, screaming at them, don't move, and I believe he, it was abusive, obscene" (Hessemer Deposition at 12-13). At the evidentiary hearing, Hessemer testified that "if anybody had me on the ground and screaming at the top of his lungs as the man was doing, I would have to say I would be forced to shoot him" (H. 641).

This evidence shows that Mr. Young withdrew when he retreated to his car and asked Bell to let him and his friends leave (R. 2244-46; 2298). In addition, when Mr. Young had the option of initiating a violent encounter with Bell (whose gun was aimed at Mr. Young's head), Mr. Young did not aim his weapon at Bell but obeyed his orders to get out of the car (R. 3357). Mr. Young then encouraged his friends to follow his lead and obey Bell's commands (R. 2400). The evidence also proves that Mr. Young reasonably feared that he was in imminent danger of death or great bodily harm. The witnesses agreed that Bell focused his fury on Mr. Young, threatening to shoot him, or "blow his head off," if any of the other boys moved (R. 2248, 3357, 3403, 3429). When Harris turned his head slightly, Bell made good on his threats and shot once; he shot two more times when Harris fled the scene (R. 2262). The witnesses' descriptions of Bell's screaming, threatening, and cursing further demonstrate the reasonableness of Mr. Young's fear. In the words of Larry Hessemer, who did not testify at the trial, "if anybody had me on the ground and screaming at the top of his lungs as the man was doing, I would have to say I would be forced to shoot him." (H.

641).

If, as the State argues, self-defense is irrelevant to this case, Mr. Young's jury would not have been instructed on self-defense, the State would not have presented witnesses on this issue, the State Attorney would not have emphasized Trooper Brinker's "certainty" that he heard shotgun shots first and would not have repeatedly argued that Mr. Young fired first, and this Court would not have addressed the issue on direct appeal. This Court recognized on direct appeal that the order of shots fired was a key issue at trial and that the trial testimony was inconsistent on this issue. Young v. State, 579 So. 2d 721, 723 (Fla. 1991)("Young's theory of defense at trial was self-defense, but trial testimony conflicted about whether Young or the victim shot first."). In denying Mr. Young's claim that the evidence was insufficient to support a first-degree murder conviction, this Court noted that "[a]lthough conflicting, the jury could, and obviously did, believe the testimony that the first and last shots came from the shotgun, thereby negating the claim of self-defense." Id. (emphasis added). Clearly, this Court's denial of Mr. Young's sufficiency of the evidence claim was based on the fact that the State's witnesses testified (and the jury believed) that Mr. Young shot first. The jury would not have rejected Mr. Young's self-defense claim and would not have found him guilty of first-degree murder (under either a premeditation or a felony murder theory) if not for the State's withholding of material, exculpatory evidence and trial counsel's failure to present

additional witnesses on the order of shots fired and the victim's propensity for aggression and violence.[15]

Additional witnesses could have testified that they heard pistol shots (from the victim) before the shotgun shots (fired by Mr. Young), and the material withheld by the State would have enabled trial counsel to impeach the State's witnesses' testimony that they heard the shotgun shots first. This Court must consider that the trial testimony was conflicting about the order of shots, that Ms. Painter and Mr. Hessemer would have shifted the balance of the evidence in favor of Mr. Young's self-defense theory, and that the evidence withheld by the State constitutes persuasive impeachment of its trial witnesses. Under Gunsby, this Court must consider the cumulative effect of all the evidence not presented to Mr. Young's jury; in this case, all of that evidence concerns the order of shots fired and Mr. Young's self-defense claim.[16]

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[15]The circuit court's sentencing order also reveals that Judge Cohen relied on the State's witnesses' testimony that Mr. Young shot first to reject Mr. Young's claim that he shot Bell in self-defense (R. 4664-65).

[16]The State misunderstands counsel's argument regarding the necessity of conducting a cumulative analysis. The State notes that "Young next complains that the trial court failed to consider the cumulative effect of all the evidence in assessing the prejudice prong of his ineffectiveness claim" (AB at 55). Mr. Young argued in his Initial Brief that the circuit court failed to consider the cumulative effect of all the evidence that was not presented to Mr. Young's jury, whether due to trial counsel's ineffectiveness or the State's failure to disclose Brady material. Due to the State's misunderstanding of Gunsby, it urges this Court to consider the effect of the evidence not presented due to trial counsel's ineffectiveness in isolation

The State's argument that State Attorney notes about Trooper Brinker, Dr. Roth, and witness interviews at the range are not Brady material reveals its misunderstanding of the State's Brady obligation. Citing Florida Rule of Criminal Procedure 3.220(g)(1), the State argues that notes about witnesses are not discoverable because "[m]ental impressions are classic work product that is specifically exempt from disclosure during pretrial discovery" (AB at 58).[17] The notes that were withheld by the State Attorney do not constitute mental impressions but are summaries of the witnesses' statements. The note about Trooper Brinker states: "Bolster Trooper Brinker/arms expert/when he heard the noises, he was 1 block away + detached, because he didn't know if it was gunshots or fireworks." The note about Dr. Roth states: "Dr. Roth - don't need/heard firecrackers, then 2 more bangs./thought all the shots were firecrackers./not a good W." Even if these notes did contain "mental impressions" (which they do not), a State's procedural rules must yield to a defendant's due process right to a fair trial which includes "the right to a fair opportunity to defend against the State's accusations" by thoroughly cross-examining

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from the effect of the material not presented due to the State's violation of Brady. The circuit court did not conduct a cumulative analysis of the effect of all the evidence that was not presented to Mr. Young's jury.

[17]Rule 3.220(g)(1) provides an exemption to a prosecutor's discovery obligation for "legal research . . . records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs."

the State's witnesses. Chambers v. Mississippi, 419 U.S. 284, 294 (1973). In recognition of a defendant's right to receive material, exculpatory evidence, Rule 3.220(b)(4) requires that the prosecutor disclose "any material information within the state's possession or control that tends to negate the guilt of the defendant as to any offense charged." As this Court has recognized, "the content of Rule 3.220 was no doubt strongly influenced by the Supreme Court's decision in Brady v. Maryland." State v. Hall, 509 So. 2d 1093, 1096 (Fla. 1987). See also Smith v. State, 500 So. 2d 125, 127 (Fla. 1987)(same). Mr. Young's argument that the State Attorney's notes in this case were improperly withheld is further supported by Kyles v. Whitley, 514 U.S. 419 (1995), in which the Supreme Court reversed the defendant's conviction because notes from a prosecutor's interviews with witnesses, which could have been used to impeach those witnesses at trial, had been withheld from trial counsel.

In regard to Mr. Young's claim that the State improperly withheld notes indicating that several State witnesses were interviewed at "the range," the State argues that "Young's allegations were so vague and speculative that he could not even articulate any impropriety on the part of the State" (AB at 60). The impropriety was the failure to disclose these notes to Mr. Young's trial counsel. It is clear from the notes that only State witnesses were taken to the range, suggesting that the purpose of the interviews was to review the sounds of different gunshots in an effort to coach these witnesses on the crucial

issue in this case: the order of shots fired. Moreover, and most significantly, regarding those witnesses who would have testified favorably for the defense, the prosecution notes specifically indicate that these people were not to be taken to the range. None of this information reached the jury because it was withheld by the prosecution. An evidentiary hearing is clearly warranted.

The State also suggests that because Trooper Brinker and Dr. Roth were listed on the State's discovery answer the withholding of notes about their initial statements is not a Brady violation. (AB at 58-59).[18] Mr. Young's Brady claim did not allege that the names of these witnesses were unknown to trial counsel but that notes reflecting the substance of their initial statements had been withheld, thereby preventing trial counsel from conducting an effective cross-examination of Trooper Brinker; as the Supreme Court explained in Kyles v. Whitley, notes that reveal inconsistent versions of important facts or which give rise to "a substantial implication that the prosecution had coached [the witness]" are Brady material that must be provided to the defense. Kyles, 514 U.S. at 443. The fact that the State included the witnesses' names in discovery does not excuse its failure to disclose the notes.

The State also claims that the State Attorney's notes about bolstering Trooper Brinker are undiscoverable "trial strategy"

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[18]Assuming the State's view to be correct, then Mr. Young received ineffective assistance of counsel. However, because the lower court denied an evidentiary hearing on these allegations, there is no resolution of these factual disputes.

(AB at 59). The fact that Trooper Brinker testified that he was "100 percent certain" that he heard shotgun shots first while his initial statement reveals that he told the State Attorney that "he didn't know if it was gunshots or fireworks" reveals that Trooper Brinker's testimony was not merely bolstered but was materially changed from the time of his initial statement. The State cannot possibly argue that the presentation of false testimony is "trial strategy." The withheld note reveals a contradictory statement, and also reveals that it was necessary for the State to "bolster" his testimony which is tantamount to the State telling Brinker to lie. A State cannot get a witness to lie or embellish and then turn around and claim that such is "trial strategy." Kyles v. Whitley.

As to Mr. Young's allegations regarding the character evidence regarding the victim, the State argues that "Young did not reveal the source of this testimony until his initial brief" and thus the State was prevented "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" (AB at 61 n. 17). First and foremost, this argument was not presented below by the State and is therefore waived. Cannady. At no time either in its written pleading or during the Huff hearing did the State complain about not knowing the "source" of the evidence alleged in Mr. Young's motion, and thus the State's vitriolic allegation of "gamesmanship" and "deceptive pleading practice" (AB at 61) is

unworthy of much response. If the State believed it could not respond because of what it now complains were pleading deficiencies, it should have stated so below. Certainly the State did not include these complaints in the order it wrote for the lower court judge.

In his Rule 3.850 motion, Mr. Young alleged, as was done in Haliburton and Gunsby, that the jury did not hear of the significant information regarding the character of the victim due to a combination of either a Brady violation, ineffective assistance of counsel, or because it was newly discovered evidence. In fact, Mr. Young's 3.850 motion detailed that many of the statements were recently disclosed to Mr. Young's counsel. The "source" of the information is not relevant, as a trial court is required to review the allegations and accept them as true irrespective of their "source" as this Court recently acknowledged in Valle v. State, 705 So. 2d 1331 (Fla. 1998). Mr. Young clearly identified that the prosecution did not disclose a letter written by the victim's sister, and that the statements by Mike Bell and Trooper Jowers were made subsequent to Mr. Young's trial. Thus the State misrepresents the record when arguing in its brief that Mr. Young failed to make specific allegations.[19] Reversal is warranted for an evidentiary hearing.

ARGUMENT VI

Mr. Young's Rule 3.850 motion alleged that trial counsel

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[19]Notably, however, the State does not challenge the fact that the evidence would have been admissible under the statutory and case law cited in Mr. Young's brief. See IB at 75-77.

failed to discover and present mitigation evidence and that substantial mitigation was presented only to the judge at sentencing but was unreasonably never presented to the jury. The Assistant Attorney General argued at the Huff hearing that "[c]ounsel obviously had a reason not to bring the evidence to the jury" (H. 534). The same Assistant Attorney General then wrote the order denying a hearing on this claim, finding that trial counsel had a tactical reason for not presenting mitigation evidence to the jury (PC-R. 1300). The State repeats this same unsupported argument in its Brief, noting that "[o]bviously, trial counsel had a reason for not presenting these witnesses to the jury" (AB at 72). While the State admits that "such a reason or tactical strategy should normally be revealed at an evidentiary hearing," it justifies the denial of this claim without a hearing, arguing that "the record in this case plainly and unambiguously reveals why counsel did not present these witnesses for the jury to consider" (AB at 72-73).

The Attorney General cannot possibly know why Mr. Young's trial attorney did not present mitigation evidence to the jury because a hearing was denied on this claim; as a result, there is no testimony regarding any strategic decisions to not present mitigation, and, contrary to the State's Answer Brief, the record does not reveal trial counsel's thought processes. The circuit court, in the order written by the Assistant Attorney General, ignored this Court's precedent requiring that allegations contained in a Rule 3.850 motion be accepted as true and that an

evidentiary hearing be granted unless the record conclusively rebuts the defendant's claims. Valle v. State, 705 So. 2d 1331 (Fla. 1998).

According to the State, trial counsel's strategic reason for not presenting the available mitigation to the jury is that doing do would allow the State to present evidence of Mr. Young's prior convictions to rebut any testimony tending to show that he is a good person. However, the State ignores that the trial court prohibited the State from presenting this evidence pursuant to defense counsel's pretrial motion. The State also ignores that Dr. Crown's testimony about mental health mitigation cannot be simplistically described as evidence that Mr. Young is "a good person;" contrary to the State's argument, Dr. Crown's testimony would not have opened the door to evidence about Mr. Young's prior convictions.

The State's assumption that trial counsel made a strategic decision to not present mitigation is also belied by the trial record. Trial counsel did present some mitigation evidence, and the trial court excluded evidence of Mr. Young's juvenile convictions. However, Mr. Young's motion alleged that, without a reasonable tactic or strategy, additional mitigation was not presented, including compelling mental health mitigation. Because "there is nothing in the record to rebut [Mr. Young's] assertion," an evidentiary hearing is warranted. Valle, 705 So. 2d at 1334. Because a hearing was denied on this issue, trial counsel's reasons for not presenting this evidence are unknown.

It cannot be assumed in the absence of his testimony that he had a strategic reason for not presenting available mitigation.

In response to Mr. Young's argument that trial counsel was ineffective for failing to present Dr. Crown's testimony about mental health mitigation, the State claims that "[i]f 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" (AB at 79) (emphasis added). This argument reflects the State's failure to accept Mr. Young's allegations as true. The fact that trial counsel's failure to present this testimony is, by the State's own admission, unreasonable supports rather than defeats Mr. Young's argument that his trial counsel was ineffective. A hearing is warranted. Rivera v. State.

The order denying a hearing on this claim (written by the State) erroneously found that Dr. Crown's testimony was limited in scope because his examination of Mr. Young uncovered no evidence supporting mental health mitigating factors. This conclusion fails to accept Mr. Young's allegations as true. Mr. Young specifically alleged that "[b]ecause of counsel's prejudicially deficient performance, Dr. Crown only testified to a minute portion of the mitigation which was available had he been asked to conduct a complete examination of Mr. Young's case" (PC-R. 1160). Because a hearing was denied on this issue, the circuit court did not hear the full extent of Dr. Crown's

possible testimony, and the Attorney General cannot conclude that such evidence did not exist simply because trial counsel failed to present it.

Mr. Young also claimed that his trial counsel was ineffective for failing to object to the State Attorney's improper and inflammatory closing argument. The circuit court, in the order written by the State, denied this claim, finding it was procedurally barred because it could have been raised on direct appeal (PC-R. 1303). The State repeats its mistake in its Answer Brief when it argues that "[a]ll of the alleged prosecutorial misconduct appears in the direct appeal record. Young could have and should have challenged the comments on direct appeal" (AB at 84-85). Contrary to the State's suggestion that "[t]o overcome the procedural bar, Young challenged the comments under the guise of ineffective assistance of counsel" (AB at 85), Mr. Young is not raising a claim about the impropriety of the State Attorney's comments but about his trial counsel's failure to object. This is a cognizable claim in a Rule 3.850 motion, as the Court recently reaffirmed in Mordenti v. State. In Mordenti, the Court reversed a summary denial of numerous claims, including ineffective assistance of counsel claims for failing to object to error at trial which had been barred by the Court on direct appeal due to lack of objection. Then on the Fourth District Court of Appeals, Justice Pariente explained very clearly that a failure to object allegation is properly raised in a Rule 3.850 motion: "trial counsel's failure

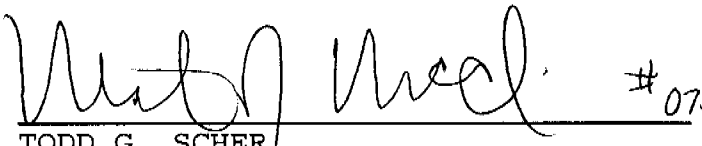
to object to reversible error, while waiving the point on direct appeal, does not bar a subsequent, collateral challenge based on a claim of ineffective assistance of counsel". Davis v. State, 648 So. 2d 1249 (Fla. 4th DCA 1995).

The failure by counsel to object to the State's closing argument resulted in prejudicial and inflammatory comments urging the jury to sentence Mr. Young to death. The State is simply wrong in its conclusion that this claim is procedurally barred and its accusation that Mr. Young's ineffective assistance of counsel claim is only a "guise" to avoid a procedural bar. The State also argues that "[g]iven the highly subjective nature of closing argument . . . defense counsel's failure to object cannot be deemed per se unreasonable" (AB at 85). Given this Court's precedent establishing the permissible boundaries of closing argument, the failure to object to the State Attorney's impermissible argument in this case was unreasonably deficient performance. Reversal for an evidentiary hearing is warranted.

CONCLUSION

Mr. Young submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding. At a minimum, a full evidentiary hearing should be ordered. As to claims not addressed in this Reply Brief, Mr. Young relies on his Initial Brief.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 6, 1998.



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