IN THE SUPREME COURT OF FLORIDA

MARK JAMES ASAY,

Appellant,

v. CASE NO. 90,963

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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CERTIFICATE OF TYPE SIZE AND STYLE

Appellee hereby certifies that the Answer Brief is typed in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Appellee does not accept Asay's Statement of the Case and Facts (Initial Brief at 1-44), which, despite its length, is largely incomplete and argumentative. Due to the length of this Answer Brief, however, it is not feasible for the State to fully re-present the facts and procedural history. Much of the procedural history of the case, in any event, is set forth in Point II, infra, and the facts relevant to the primary claims on appeal, i.e., ineffective assistance, are set forth in Points III and IV, infra. For the primary facts of the case, the State relies on this Court's recitation of facts in Asay v. State, 580 So.2d 610, 610-12 (Fla. 1991).

SUMMARY OF ARGUMENT

Asay presents five primary points regarding the circuit court's denial, following evidentiary hearing, of his motion for postconviction relief. Assay's first claim, that Judge Haddock, who presided over both the trial and the postconviction proceedings, was biased and subject to recusal, is largely

procedurally barred and untimely, as well as without merit. Asay's claim that he was denied a fair postconviction hearing due to evidentiary rulings by the judge is likewise without merit. The court did not abuse its discretion in excluding irrelevant or cumulative evidence on the ineffective assistance claims and, indeed, allowed Asay to make more than a full record on these matters. Asay's allegation concerning a witness, whose testimony was never properly proffered, also has no merit and would not have been a valid basis for relief, even if asserted in a timely manner. As to Asay's claims of ineffective assistance at the guilt and penalty phases, the court's conclusion that neither deficient performance nor prejudice had been established is correct. Trial counsel investigated the case, as well as Asay's background, despite obstacles put in his way by Asay's family. Counsel made valid strategic decisions not to present a defense of intoxication or one of mental mitigation, given the former's incompatibility with the facts of the case and the lack of support for the latter due to a very unhelpful report from a confidential mental health expert. Counsel presented a reasonable defense in the guilt phase and had Asay's mother testify at the penalty phase as to his good qualities. The postconviction record clearly indicates that further investigation of Asay's background or mental mitigation

would not have been fruitful because Asay had a violent past and conducted himself poorly in prison. The court expressly found the testimony of the mental health experts called by collateral counsel unworthy of belief. Asay's convictions and sentences of death are reliable. His final "kitchen sink" claim summarily alleges that denial of all remaining claims was error and presents no basis for relief. The circuit court's denial of postconviction relief should be affirmed in all respects.

POINT I

DENIAL OF ASAY'S MOTION TO RECUSE JUDGE HADDOCK WAS NOT ERROR.

Collateral counsel raise an amorphous multi-faceted claim concerning Judge Haddock's alleged partiality both at trial and during the postconviction proceedings. Collateral counsel moved to recuse Judge Haddock, and that motion was denied. The postconviction motion contained two claims relating to the judge's alleged lack of impartiality, both in the past and prospectively. On appeal, Asay draws this Court's attention to additional matters that were not the subject of objection or motion for recusal. The majority of the matters presented in this claim are improperly presented, and no basis for postconviction relief exists.

Judge Haddock was the presiding judge in 1987 and 1988 and sentenced Asay to death. Following this Court's affirmance of Asay's convictions and sentences of death, Asay v. State, 580 So.2d 610 (Fla. 1991), the United States Supreme Court denied certiorari on October 7, 1991, Asay v. Florida, 502 U.S. 895 (1991). The Office of the Capital Collateral Representative (CCR) assumed responsibility for representing Asay and, on March 16, 1993, filed a motion to vacate conviction and sentence, requesting leave to amend (PCR I 1-63).[1] Claim II (PCR I 9-11) alleged that Asay was denied a fair trial because Judge Haddock was prejudiced against him and that trial counsel was ineffective for failing to recuse the judge. The bases for this claim were two remarks made first on excusal of a juror (OR 351) and second during a charge conference and discussion of applicable precedent (OR 740). Claim III (PCR I 11-13) alleged that Asay would be denied a fair postconviction proceeding if Judge Haddock presided over it because of comments in his post-trial order granting attorneys fees to Asay's trial counsel which Asay's present counsel deem objectionable.

[1] (OR __) represents a citation to the original record on direct appeal, Asay v. State, No. 73,432; (PCR __) represents a citation to the postconviction record in this case; and (PCR(S) I __) represents a citation to the first supplemental postconviction record filed July 17, 1998.

Later, collateral counsel filed a formal motion to disqualify Judge Haddock, pursuant to Rule of Judicial Administration 2.160, raising, as grounds, the allegations in Claims II and III of the 3.850 motion (PCR I 75-82). After a hearing on April 19, 1993, the judge orally denied that motion as "not effectively valid" and not raising "any issues on which disqualification could or should [lie]". (PCR III 9-14). This ruling was repeated in two written orders (PCR I 83, 84).

At the Huff hearing of February 12, 1996, some three years later, collateral counsel stated:

> MR. KISSINGER: Your Honor, claim three, I believe contends that this court should not preside over this proceeding. And again, due to preexisting opinion regarding Mr. Asay, we presented this to the court in a motion to recuse which the court denied as legally insufficient. No writ of prohibition was sought from that. And I believe that issue too is moot at this point.
>
> The court's ruled. We're willing to live by the court's decision as to claim three.

(PCR XVI 381). In its March 21, 1996 order determining the issues to be heard at the evidentiary hearing, the court reviewed all the claims pled in the 3.850 motion and, as to Claim III, noted that a separate motion for recusal had been filed, heard, and ruled on and that no interlocutory appeal had been taken (PCR(S) I 66). The court noted the defense theory, that the court wrote one thing but

meant another, could not provide a basis for recusal (PCR(S) I 66). No subsequent motion for recusal was filed, and the proceedings ended with a notice of appeal filed on May 23, 1997, after final judgment.

Collateral counsel contend that Asay was deprived of a fair postconviction proceeding because of: (1) the two remarks the judge made during the trial (raised in the postconviction motion and the motion for recusal); (2) the judge's remarks in the order granting attorney's fees (raised in the postconviction motion and the motion for recusal); (3) the judge's alleged comment on the grounds for recusal in his order setting issues for the hearing (never raised below); and (4) Judge Haddock's praise of trial counsel's abilities and disparagement of a defense witness in denying postconviction relief, (never raised below) (Initial Brief at 45-52). The claims in the motion to vacate were not properly or timely presented, and, because Asay never raised any claim of error or renewed the motion for recusal regarding Judge Haddock's statements in his March 21, 1996 order or the final order of April 23, 1997, these matters are waived or procedurally barred now. Doyle v. State, 526 So.2d 909, 911 (Fla. 1988) (postconviction claim raised for first time on appeal and never presented to the circuit court was procedurally barred on appeal).

Any right to recusal may be waived if not asserted in a timely fashion. Rivera v. State, 717 So.2d 477, 480-2, n3 (Fla. 1998) (postconviction claim that trial court should have been recused due to statements made five months before trial "forever waived as a ground for disqualification" in absence of timely motion); Steinhorst v. State, 695 So.2d 1245 (Fla. 1997) (postconviction claim that original trial judge should have recused himself, given recusal in codefendant's case, waived where defendant failed to exercise due diligence and assert claim in a timely fashion); Lightbourne v. Dugger, 549 So.2d 1364 (Fla. 1989) (postconviction claim that trial court should have recused itself given financial contributions from victim's family procedurally barred or waived where basis for claim previously available and matter not timely asserted). A defendant learning of grounds for recusal during a postconviction proceeding may request the opportunity to present them, even mid-hearing. Rogers v. State, 630 So.2d 513, 516 (Fla. 1995). Collateral counsel have failed to explain why these matters were not asserted in the circuit court, given the fact that over a year elapsed from the time of the judge's statements in the initial

order. This portion of Asay's claim has unquestionably been waived.[2]

The judge's observations in his final order of April 23, 1997, i.e., that trial counsel (whose testimony he credited in denying relief) was a "talented" attorney (PCR II 265) and that Sharp's testimony had been "useless" (PCR II 266), were determinations of credibility by a finder of fact, and any characterization by the court of Sharp's relationship with Asay was simply surplusage. No basis for relief exists. Jones v. State, 446 So.2d 1059, 1061 (Fla. 1984) (trial court's commendation of defense counsel at conclusion of trial no basis for recusal from postconviction proceedings); Correll v. State, 698 So.2d 522, 524-5 (Fla. 1997) (trial court's observations that it would have found witness qualified as expert, despite allegations to the contrary, was not reliance on personal knowledge or matters outside the record, meriting recusal).

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[2] The only time this Court has overlooked a capital postconviction defendant's failure to timely seek recusal was Maharaj v. State, 684 So.2d 726, 728 (Fla. 1997), where collateral counsel may have not fully learned of the grounds for recusal until the postconviction appeal. This Court found recusal warranted because it was remanding the cause to the circuit court on other grounds, and the presiding judge had announced his inability to preside over an evidentiary hearing, given his prior status as a prosecutor. This Court described the circumstances in Maharaj as "unique," and Asay's case bears no resemblance to them.

As to the comments in the March 1996 order, a court's statements in denying even a legally insufficient motion for disqualification may give rise to an independent basis for recusal, Turner v. State, 598 So.2d 186 (Fla. 1st DCA 1992), but this is not such a case. The procedural posture of this claim is particularly important. Judge Haddock denied Asay's one and only motion for recusal on April 19, 1993, and his reference to that in his 1996 order was not a ruling of any kind. At the Huff hearing, collateral counsel stated on the record that the recusal issue was "moot" and that the defense was "willing to live with the court's decision" (PCR XVI 381). Under these circumstances, Asay's reliance on Cave v. State, 660 So.2d 705 (Fla. 1995), where the trial court literally held an evidentiary hearing on the merits of the motion for recusal before ruling on it, is clearly misplaced. Judge Haddock's remarks in the order at issue recognized that the claim was premised on a belief that the court said one thing but meant another and that such belief was not a valid basis for recusal (PCR(S) I 66). Even in the context of ruling on a motion for recusal, a trial court may "explain the status of the record." Barwick v. State, 660 So.2d 685,693-4 (Fla. 1995); Kowalski v. Boyles, 557 So.2d 885, 886-7 (Fla. 5th DCA 1990); see also Nassetta v. Kaplan, 557 So.2d 919, 921 (Fla. 4th DCA 1990) (judge's comment

in denying motion for recusal that his remarks had been taken out of context did not provide independent basis for recusal). Even if properly presented, these complaints were insufficient to create a well-founded or reasonable belief in Asay's mind that he would not receive a fair hearing. Barwick.[3]

This leaves the formal motion for recusal regarding the claims in the postconviction motion, relating to the two comments during the trial and the written notations in the order granting counsel's fees. The latter document appears in neither the record on appeal nor the postconviction record. Although collateral counsel rely on Zeigler v. State, 452 So.2d 537 (Fla. 1984) (Initial Brief at 48), in arguing that presenting these matters was proper, that reliance is misplaced. Zeigler expressly held that the portion of Zeigler's postconviction claim of trial court bias that relied on "facts and circumstances known at the close of the trial . . . could have been addressed on direct appeal and are not cognizable on Rule 3.850." Id. at 539-540; see also Stano v. State, 520 So.2d 278, 281 (Fla.

[3] Asay's inclusion of a prospective claim for recusal in the 3.850 motion itself was improper, given the fact that recusal was separately sought by motion. A motion for postconviction relief is limited to grounds constituting a basis to vacate the underlying judgments or sentences. Judge Haddock's presiding over a postconviction proceeding in this case, even if "wrongful," would not be a basis to vacate Asay's underlying convictions or sentences. Given the intrinsic impropriety of Claim III, no error in its alleged disposition can be any basis for relief.

1988) (postconviction claim that trial court should have recused itself given its accepting Stano's guilty pleas in other cases procedurally barred because it should have been raised on appeal). Here, all of the matters presented as a basis for recusal were apparent on the face of the trial record, and should have been presented earlier under the rationale of Zeigler, Stano, and Rivera. Accordingly, they are procedurally barred now.

Further, Asay's formal motion for recusal was untimely because it was filed beyond the ten-day time period in Florida Rule of Judicial Administration 2.160. Judge Haddock presided throughout this case, and reasonable collateral counsel, utilizing due diligence, could have ascertained that he would preside over any postconviction proceedings. Yet, the motion for recusal was not filed until March 30, 1993, over a year and a half after Asay's convictions and sentences became final and collateral counsel began representing him. This Court has found waiver under comparable circumstances. Willacy v. State, 696 So.2d 693, 695 (Fla. 1997) (defendant's motion for recusal untimely where judge re-appointed to hear resentencing proceedings, because grounds for motion existed since trial or prior proceeding; defendant was represented by counsel throughout and failed to file motion more than ten days prior to re-appointment).

As in Willacy, the claims raised here are "speculative, . . . without factual basis and thus legally insufficient." Id. at 695, n5. Judge Haddock's remarks on excusing a potential juror were, at most, a jocular expression of a legal philosophy not bearing on Asay's case (OR 351). Only the most suspicious and paranoid mind would construe his later remark during a bench conference, on applicable precedent (OR 740), as indicating partiality. These remarks were legally insufficient to create a reasonable or well-founded fear on Asay' part that Judge Haddock could not fairly preside over any proceedings involving him. Quince v. State, 592 So.2d 669, 670 (Fla. 1992) (recusal of judge not required where, referring to Florida capital postconviction proceedings, judge referred to out-of-state lawyers "looking down their noses" at "rednecks in Florida" where comment was unrelated to specific case at hand); Jernigan v. State, 608 So.2d 569, 570 (Fla. 1st DCA 1992) (claim that judge should have recused himself because he was "prejudiced" against all child abusers insufficient basis for recusal). Asay relies on Porter v. State, 723 So.2d 191 (Fla. 1998) (Initial Brief at 48), but Porter should be limited to its unique facts. In promulgating Porter this Court did not mean to encourage counsel to scour the cold record of proceedings long concluded and take judicial remarks out of context to create post

hoc allegations of fundamental bias. Jackson v. State, 599 So.2d 103, 106-7 (Fla. 1992) (defendant's claim that judge's comments "seem to infer a predisposition by the judge as to the facts" legally insufficient to merit recusal); Dragovich v. State, 492 So.2d 350, 352-3 (Fla. 1986) (defendant's conclusory assertion that judge had fixed opinion of guilt and predisposition toward death sentence insufficient to merit recusal because, "in capital cases, we must assume that trial judges fairly weigh the aggravating and mitigating circumstances unique to each defendant in determining the appropriate sentence.").

In granting trial counsel's fees, the court commented that it considered whom to appoint to represent Asay, "an unsympathetic, discordant and uncongenial defendant," who would likewise endure the "wrath and hostility of the victim's parents and friends." Collateral counsel's far-fetched arguments claim that these remarks indicate *ex parte* contact, not between the judge and the State (the traditional allegation), but between defense counsel and the judge, a virtually unprecedented basis for recusal. A further claim is that the court's reference to the victim's family was a misnomer and that the judge meant to refer to Asay's family. According to collateral counsel, "nothing in the record suggests that the family and friends of the victims in this case, a procurer of prostitutes

and a transsexual prostitute, ever contacted Mr. David," meaning that "the defendant is informed and therefore believes that the court intended to refer to the defendant's family and friends." (PCR I 77-9).

Putting aside for the moment that the existence of an *ex parte* contact would not provide an automatic basis for recusal (let alone *ex parte* contact involving defense counsel), Barwick, 660 So.2d at 692, Nassetta, and the fact that any apprehension on the part of a defendant that he would not receive a fair hearing must be "well-founded" or "reasonable" (as opposed to unreasonable or bordering on the psychotic or paranoid), Gilliam v. State, 582 So.2d 610, 611 (Fla. 1991), Fisher v. Knuck, 497 So.2d 240, 242 (Fla. 1986) (defendant's subjective fears insufficient basis for recusal), it is clear that no valid basis for recusal has been presented. When the judge entered the order in question, he had already presided over Asay's trial, at which the jury convicted Asay of some of the most "uncongenial" and racially malevolent crimes in Florida history, and had had a good opportunity to observe Asay's interaction with counsel.

The trial record reflects that Asay attempted to discharge David, given his dissatisfaction with his cross-examination of one witness (a matter raised and rejected on direct appeal, Asay, 580

So.2d at 621, n1). At that time, Asay moved to fire David and demanded a mistrial and change of venue, as well as the appointment of two lawyers. When rebuffed, Asay told the judge that he intended to talk to the jury "the way he talked to the court," whereupon Judge Haddock reminded him that, if he were disruptive, he would be bound and gagged (OR 537-46). Denial of Asay's motion for recusal was not reversible error. Oats v. State, 619 So.2d 23, 25-6 (Fla. 4th DCA), review denied, 629 So.2d 134 (Fla. 1993) (judge's reference to defendant as "an obstinate jerk" did not merit mid-trial recusal); Nassetta. Collateral counsel's belief that the court said one thing about the victim/defendant's family but meant another cannot be a well-founded basis for recusal. Cf. Sybers v. State, 709 So.2d 128, 129 (Fla. 1st DCA 1998) (party seeking to disqualify judge cannot create the very bias of which he complains). Even had these matters been presented properly below, recusal would not have been warranted, because they were legally insufficient to create a reasonable or well-founded fear on Asay's part that he would not receive a fair trial or proceeding, under the standard in Barwick, Jackson, or Fisher. As in Fisher, it is difficult to escape the conclusion that the motion was filed only "to frustrate the process by which petitioner suffered an adverse

ruling." 497 So.2d at 242. The court's rulings should be affirmed in all respects.

POINT II

ASAY RECEIVED A FAIR EVIDENTIARY HEARING.

Asay claims that certain rulings by Judge Haddock deprived him of a fair evidentiary hearing, to-wit: (1) exclusion of Thomas Gross' testimony, relevant to claims under Strickland v. Washington, 466 U.S. 668 (1984), Brady v. Maryland, 373 U.S. 83 (1963), and/or Giglio v. United States, 405 U.S. 150 (1972); (2) quashing a subpoena *duces tecum* for records allegedly relevant to (1); (3) alleged preclusion of "mitigating" evidence relevant to Claim III; and (4) alleged preclusion of evidence of counsel's failure to cross-examine certain witnesses (Initial Brief at 53-66). The last item has also been raised in Point IV (Initial Brief at 86-8), and the State will address it as part of Point IV, infra.

A. Preclusion of Mitigation

The record reflects that, in fact, Judge Haddock allowed Asay's family members to testify extensively to the circumstances of their upbringing (PCR XIX 858-903; 921-1016). At most, the court excluded, as irrelevant, testimony about abuse of other family members that Asay did not witness or matters that occurred when he was a newborn. Prior to ruling, the court allowed an

adequate proffer to be made (PCR XIX 946-951 [exclusion of testimony of oldest sister's suicide attempt possibly after she moved out of home, where no showing Asay aware]; 965-971 [exclusion of testimony of half sister to sexual abuse of female family members when Asay was age two and testimony about witness's life before she moved in with Asay's family]; 975-6 [sustaining objection to testimony from same witness on whether Asay had problems with his mother when he left home, in absence of showing that witness had basis to know]; 981-4 [exclusion of testimony of another half sister to mother's statements to her about Asay's birth and the fact that she did not want him; court allowed testimony of any neglect by mother, and witness testified that she raised Asay for the first four years of his life as mother was not interested]; 985-7 [exclusion of testimony from same witness about beatings she received and that mother was sometimes better and sometimes hateful in husband's absence]).

A trial court enjoys "wide latitude" and discretion in its conduct of postconviction proceedings, Medina v. State, 573 So.2d 293, 295 (Fla. 1990), and this discretion includes the right to exclude irrelevant or cumulative evidence. Robinson v. State, 707 So.2d 688, 694-5 (Fla. 1998); Garcia v. State, 622 So.2d 1325, 1327 (Fla. 1993). Reading the postconviction record as a whole

demonstrates that Asay was allowed to present extensive evidence about the household in which he was raised, and, in his final order, Judge Haddock credited testimony about the abuse Asay suffered, specifically finding that "the picture presented during the evidentiary hearing [was] of a family at war with itself, committing domestic violence and inflicting permanent damage to one another at an early age." (PCR II 273). Judge Haddock found, *inter alia*, that counsel had a valid strategic reason for not presenting this testimony (PCR II 273). See Point III, infra. In light of the above, as well as the fact that even in a penalty phase itself the scope of mitigation is not unlimited, Johnson v. State, 660 So.2d 637, 646 (Fla. 1995), no abuse of discretion has been demonstrated, and no relief of any kind is warranted.

B. Thomas Gross

(1) Relevant Facts Of Record

Asay's initial motion for postconviction relief was filed some eighteen months after finality in this case. It contained no express Brady or Giglio claim or any claim that reasonably could be read to refer to Thomas Gross (PCR I 1-63). At most, as Claim X, the motion included a claim titled: "THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENTS RENDERED MR. ASAY'S CONVICTIONS AND DEATH SENTENCES FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS," that re-presented the same argument raised and rejected on direct appeal, Asay, 580 So.2d at 612, n1, i.e., the State improperly interjected the issue of race into the trial. As Claim XVIII, Asay alleged unspecified prosecutorial misconduct (PCR I 34-6, 60). The court originally directed that an evidentiary hearing would be held on August 16, 1993, but continued it at collateral counsel's request (PCR I 84-5; PCR(S) I 1-7; 15-24). Following collateral counsel's representation, at the hearing September 24, 1993, that the only outstanding public records request involved the Clemency Board or Parole Commission, the court directed the filing of an amended postconviction motion by November 24, 1993 (PCR VIII 158-62).

An amended motion was filed on that date (PCR I 89-193). It re-alleged Claim X as Claim XI (PCR I 140-2). Although maintaining the same title, the text included an allegation that the State called a witness only to portray Asay as a racist and "whose testimony the State knew to be wholly false, misleading and in exchange for undisclosed benefit," citing Giglio and Brady (PCR I 140). The amended motion also re-presented Claim XVIII as Claim XIX without further elaboration (PCR I 190). The State filed its response on December 16, 1993 (PCR(S) I 25-48). Pointing out that it did not oppose an evidentiary hearing on some of the ineffective assistance claims, it requested that Asay be directed to more fully particularize his allegations, thereby affording the State a meaningful opportunity to defend (PCR(S) I 34-5). The State argued that Claim XI was procedurally barred as an improper attempt to relitigate a previously rejected appellate issue and that Claim XIX was insufficiently pled (PCR(S) I 41, 46). During a hearing on July 28, 1994, the State pointed out the vague nature of some of the allegations in the motion and renewed its request that the court direct Asay to flesh out the allegations to assist in determining the issues for any eventual hearing (PCR IX 217). Asay's counsel responded that this was an impermissible "back-handed" request for discovery (PCR IX 218-9).

Due to the public records litigation and stays resulting therefrom, the Huff hearing in this cause was not held until February 12, 1996 (PCR XVI 365-434). During that hearing, collateral counsel again took umbrage with the request for further elaboration, including the naming of any prospective witness (PCR XVI 382-6). Counsel repeatedly stated that there was no reciprocal discovery in postconviction proceedings and maintained that the State was not entitled to discovery of any kind, citing (erroneously) State v. Lewis, 656 So.2d 1248 (Fla. 1995), and suggesting that the State sought to "steal the investigative efforts of Mr. Asay" (PCR XVI 385). During argument on Claim XI, collateral counsel claimed that, although the title of the claim was similar to a claim presented on direct appeal, it alleged that the State presented a witness who testified falsely. Collateral counsel added: "Now, it doesn't state the name of the person or anything like that, but it says that there was a witness introduced and that the evidence was false," which constituted "a flat out statement of fact," and not one that was "in any way conclusory in nature" (PCR XVI 395). Counsel later argued that Claims XI and XIX should be considered merged and stated that the State's assertion that Claim XIX was insufficiently pled was refuted by the fact that "the facts are set forth throughout the motion." (PCR XVI 404).

The State reiterated its position that Claims XI and XIX were insufficiently pled, stating, ". . . the Court, I think, should require defense counsel [to] list the witnesses or witness that they have that would prove this. As alleged, there is not really much to it." (PCR XVI 410). Asay's counsel adhered to his view that, in seeking discovery or even clarification or amplication of the pleadings, the State sought to make Asay "do their work for them" and that the public records law would somehow help the State in this respect (a rather interesting proposition in light of Kight v. State, 574 So.2d 1066, 1068-9 (Fla. 1990)) (PCR XVI 416-7). In his March 21, 1996 order, Judge Haddock found that Claim XI was procedurally barred as an improper attempt to relitigate a previously rejected appellate issue and that Claim XIX was purely conclusory, facially invalid, and procedurally barred (PCR(S) I 69, 71).

As the evidentiary hearing was set to begin on March 25, 1996, the prosecutor advised the court that Asay had subpoenaed him as a witness and that collateral counsel had told him it was "regarding a witness, Mr. Thomas Gross" (PCR XVII 447). In response, collateral counsel stated for the first time that he had affidavits from Gross and purported to read from one of them; counsel stated that he also had a second affidavit from Gross and that he had

issued a subpoena *duces tecum* for "all of the cases upon which [the prosecutor] had worked on in order to further substantiate Mr. Gross's claim." (PCR XVII 457). Counsel then asserted (erroneously) that it would violate the Canon of Ethics for prosecutor DeLaRionda to further represent the State in this case and to take the witness stand on this claim (PCR XVII 453), citing Meggs v. McClure, 538 So.2d 518 (Fla. 1st DCA 1989). He then specifically identified Thomas Gross as the unidentified witness in Claim XI, stating that the "rules of pleading" did not require him to reveal that earlier or to "proffer the evidence which we will present at trial" (PCR XVII 455). Counsel also claimed that Gross was relevant to Claim IV, on which a hearing had been granted, on the theory that the State rendered trial counsel ineffective by alleged misconduct (PCR XVII 457-8). Throughout this exchange, collateral counsel repeatedly accused the State Attorney of deliberately injecting a racial motivation into this case on a bad faith basis (PCR XVII 458).

The prosecutor responded that Gross's testimony had not been the only evidence of racial motivation in the case and that, in fact, Asay's own statements to his brother and to Bubba O'Quinn clearly established the racial motivation, long before Gross came along (PCR XVII 460-1, 471-2). Collateral counsel then purported

to read from the second affidavit, in which Gross referred to his refusal to attend a deposition and claimed that the prosecutor threatened him with perjury if he deviated from his prior sworn statement when testifying at trial. Gross allegedly stated that while meeting with DeLeRionda in the latter's office he was shown photographs from another case and that he was allegedly asked to make false statements in that case (PCR XVII 465-8). Following this argument, Judge Haddock announced that he would grant the State's oral motion to quash the subpoena of the prosecutor and the subpoena *duces tecum* (PCR XVII 475).

Collateral counsel then asserted that his motion to disqualify the prosecutor was still well taken because he would likely be a witness for the State to counter Gross's allegations. The Assistant Attorney General pointed out that, under these circumstances, disqualification was not necessary because the prosecutor could be called as the first witness and examined by another attorney for the State, pointing to the capital collateral case of Johnny Williamson as an example. Counsel also pointed out that the State responded to the 3.850 motion more than two years before and that the dates of the as yet unproffered or unpresented affidavits could demonstrate that any claim involving Gross was procedurally barred (PCR XVII 478-9). In rebuttal, collateral

counsel described the State's position as frivolous because the affidavits would "relate back" to the original motion and said of the State's position on disqualification: "The fact that the State was able to convince a judge in a circuit court that ethical rules don't apply in postconviction really has very little to do with what this court should do." (PCR XVII 478-81).

The court announced that it would deny the oral motion for disqualification of the prosecutor (PCR XVII 481). Collateral counsel stated his intent to seek immediate certiorari review in this Court and requested a stay, assuring Judge Haddock that, on the disqualification, "the appellate law is on Mr. Asay's side" and that current CCR policy regarding these matters was set forth in the Paul Scott case, that was then before this Court (PCR XVII 483, 485).[4] The State reiterated that DeLaRionda could be the first witness, as was done in the Paul Scott case, to avoid any assertion of taint. Collateral counsel (who of course had subpoenaed the prosecutor precipitating the situation) announced that he was "not prepared to examine Mr. DeLaRionda" unless he first could see "every case he's worked on during that time period [presumably an

[4] Collateral counsel was correct that the disqualification issue was squarely presented in the Paul Scott case, and, indeed, in Scott v. State, 717 So.2d 908, 910-11 (Fla. 1998), this Court emphatically rejected the position asserted by Asay's counsel. See also, infra.

eighteen-month period], so he could corroborate Gross's reference to the photograph" (PCR XVII 487). Judge Haddock denied a motion to stay proceedings or to reconsider his prior disposition of Claim XI (PCR XVII 487-9).

During the testimony of Ray David, Asay's trial counsel, collateral counsel elicited testimony through hypothetical questions that David had not been aware of the State Attorney allegedly presenting false testimony through Thomas Gross (PCR XVII 513-17). The next morning, it was announced that Thomas Gross had been transported and was available to testify, but he was passed until later in the day (PCR XVIII 703). Following the testimony of one of Asay's family members, collateral counsel called Gross, and the State requested access to his affidavits, which had never been proffered or introduced by collateral counsel (PCR XVIII 904-913). The State pointed out that the date of the affidavits was relevant to asserting a procedural bar and that Gross's testimony did not fall within any claim of ineffective assistance because trial counsel could not be found ineffective for not presenting evidence that was allegedly withheld from him (PCR XVIII 914-16).

The matter was passed to the next day when both sides presented lengthy arguments (PCR XVIII 914-20; XX 1037-9). The State stated its lack of objection to a formal proffer of Gross's

testimony for the appellate record, since he had been transported to the hearing and was available (PCR XX 1039). Judge Haddock ruled that any claim involving Gross was procedurally barred and insufficiently pled (PCR XX 1046).

Following a recess, collateral counsel announced that he intended "to submit the proffer in any form that he chooses" and that, accordingly, Gross would not testify, and counsel would simply make statements into the record (PCR XX 1050-1). Collateral counsel then recited that Gross's testimony would be to the effect that: Asay never admitted committing the crimes to him; he initiated contact with the prosecutor's office to help himself; the prosecutor showed him pictures of Asay's tattoos and smiled and winked at him; he told the prosecutor that he heard Asay admit committing the crimes; the prosecutor coached him prior to his testimony; he was promised a sentence reduction in exchange for his testimony; after he gave his sworn statement in October 1987, he decided not to testify and refused to give a deposition; after this, the prosecutor threatened him with prosecution for perjury if he deviated from his prior sworn statement; and during the meeting, he was shown a photograph and asked to present false testimony in an unrelated case (PCR XX 1057-65). Following this recitation, collateral counsel announced that, although the subpoena *duces*

tecum had been quashed, the State should be directed not to destroy any documents relating to any case that DeLaRionda worked on during "that time frame" until Mr. Asay was executed (PCR XX 1067). The State pointed out it was disadvantaged in not knowing the date of the alleged meeting between DeLaRionda and Gross and that the prosecutor worked on many cases. The court took the matter under advisement (PCR XX 1068-71).

When the State began its proffer in rebuttal, collateral counsel objected to DeLaRionda denying the allegations attributed to Gross (PCR XX 1078). Collateral counsel claimed that even this proffer was an ethical violation and further evidence of why the prosecutor should be disqualified (PCR XX 1078-9). After this objection was overruled (PCR XX 1090), the State introduced for purposes of the proffer all of Gross's testimony, including his sworn statement of October 23, 1987, a transcript of the deposition he refused to give on November 24, 1987, his formal deposition of June 2, 1988, and his trial testimony of September 22, 1988 (PCR XX 1091; State's Exhibit #2).

In his sworn statement of October 23, 1987, Gross stated that he agreed, at most, with the prosecutor to tell the truth in this case and not to "testify one way or the other." He stated that he faced "numerous counts" and that he intended to plead to attempted

armed robbery and receive 22 years in prison, pursuant to a guidelines sentence of 22 to 27. Gross stated that there were no other deals and that he had not been promised anything or threatened in any way. He stated that Asay admitted committing the crimes to him while they were incarcerated together and pointed out racist tattoos on his body (State's Exhibit #2; Sworn statement of October 23, 1987, at 2-12). At a subsequent scheduled deposition on November 24, 1987, Gross refused to say anything about the case, and, at such point, David told Gross that he could be held in contempt for failing to honor the subpoena (State's Exhibit #2; Deposition of November 24, 1987). Gross later appeared for a deposition on June 2, 1988. At that time he confirmed that he was serving a 25 year sentence after receiving an additional 3 years for failing to give the prior deposition. He stated that at the time he refused to give the deposition he felt pressure from other inmates and did not think his deal of 22 years had been a very good one. In other respects, Gross's deposition testimony was consistent with his prior sworn statement. He stated that another prosecutor, Stetson, was going to write a letter asking that he be transferred to a facility away from Asay or his associates and that he would also receive a letter to the Illinois authorities, where he was on parole, as well as to DOC. Gross stated that he did not

expect to receive a reduction of his Florida sentence in exchange for his testimony (Deposition of June 2, 1988, at 4-26). Gross testified at Asay's trial on September 22, 1988 (State's Exhibit #2; OR 744-773) in total conformity with his prior sworn statement and deposition. On cross-examination, David brought out that Gross had been threatened with perjury, that he was serving a 25 year sentence, that the prosecution was writing letters on his behalf, and that he previously refused to give a deposition and later argued these matters to the jury in closing (OR 763-772; 836-9, 848, 917-18). See also Claim IV, infra.

During arguments on the proffer, Judge Haddock ruled on Asay's request that the State not destroy records allegedly corroborating Gross's account and directed the State not to destroy material relating to any case that DeLaRionda worked on November 24, 1987 or three weeks thereafter (PCR XX 1102). After talking with Gross, collateral counsel declared a complete inability to approximate a date for the alleged meeting between DeLaRionda and Gross (PCR XX 1099-1102). The evidentiary hearing concluded on March 27, 1996. On April 10, 1996, collateral counsel filed a public records demand on the State Attorney's Office requesting access to "any and all files relating to any and all homicide cases prosecuted and/or investigated by your office between the dates of June 1, 1987, and

December 31, 1988" and repeated that request on July 16, 1996, and August 19, 1996 (PCR(S) I 77-82). On September 5, 1996, collateral counsel filed a motion to compel regarding those requests (PCR(S) I 72-4) and filed another such motion, pursuant to Florida Rule of Criminal Procedure 3.852, on March 6, 1997 (PCR II 214-8). The record contains no order disposing of these motions, and the proceedings concluded with the filing of a notice of appeal on April 23, 1997, following the court's rendition of final judgment (PCR II 277-8).

(2) No Basis For Reversal Has Been Demonstrated In Regard To The Circuit Court's Handling Of Any Claim Involving Thomas Gross.

On appeal, collateral counsel contend that Judge Haddock erred in refusing to consider the recanting testimony of Thomas Gross, and in finding that Claim XI of the postconviction motion was procedurally barred. Collateral counsel maintain that they proffered Gross' testimony which allegedly was relevant to claims of governmental misconduct, State suppression of evidence and alleged ineffective assistance of counsel, and further complain that the trial court erred in quashing a subpoena *duces tecum* for certain state attorney records that allegedly would have corroborated the allegations attributed to Gross. Appellee would contend that, under the circumstances of this case, Asay is

entitled to no relief. Any postconviction claim pertaining to Thomas Gross was procedurally barred, and it is highly questionable the extent to which, if any, Asay formally proffered the testimony from this witness. Further, it is the State's contention that any error committed by Judge Haddock in excluding Gross' testimony was invited by the defense, and that the doctrine of equitable estoppel should preclude Asay from prevailing on appeal. In the alternative, the allegations attributed to Gross did not constitute any valid claim for postconviction relief, and the denial of Asay's motion should be affirmed in all respects.

Initially, it is appropriate to review the manner in which any claim pertaining to Thomas Gross was or was not raised below. It should be uncontroverted that the initial 3.850 motion filed on March 16, 1993 contained no allegation which could reasonably be construed to constitute an allegation that the State violated Giglio or Brady in their presentation of any false testimony. Although a cursory, and conclusory, allegation to such effect was contained in the amended motion filed eight months later, such assertion, comprising less than a full sentence, was "buried" in a claim for relief, bearing a title totally unrelated to Brady or Giglio (PCR I 140-2). Both the State and the Court below took the claim at face value, or "title" value, and construed it as one

relating to an improper attempt to re-raise a previously rejected appellate point (PCR(S) I 41, 46, 69, 71); although the amendment to the initial motion was allowed so that Asay could take advantage of any recently disclosed public records, it is clear that any assertion regarding Thomas Gross did not arise from the receipt of recent public records, as Gross was a witness at Asay's trial and always available to collateral counsel. During the course of proceedings, the State requested further clarification from Asay as to the basis for several of his claims, including Claim XI, stating that, as plead, it was conclusory in nature; in return, collateral counsel asserted that Asay had no obligation to provide the State with "discovery" or clarification, and accused the State of seeking to "steal" Asay's work product, suggesting that the State take advantage of the public records law if it wished any further information (PCR IX 218-19; XVI 382-6, 410, 416-7). It was only on the morning that the evidentiary hearing was to begin that collateral counsel unambiguously identified Thomas Gross as the source of the allegation in Claim XI, and provided any details as to the nature of the claim (PCR XVII 455-7). Of course, at this juncture, collateral counsel also contended that due to this allegation, prosecutor DeLaRionda had be disqualified from any further participation in the postconviction proceedings, given his

status as a witness (PCR XVII 453, 476-7); as argued below, the State was unwilling to pay this price for litigating any claim relating to Thomas Gross, in that, Asay's counsel was simply incorrect as to the state of the law.

Before turning to any more substantive arguments, it is Appellee's initial contention that Judge Haddock's finding of procedural bar was indeed correct, albeit perhaps for different reasons. Asay's convictions and sentences were final on October 7, 1991 when certiorari was denied, and Asay pled no postconviction claim which could reasonably be said to relate to either Giglio or Gross until November 24, 1993, when the amended motion was filed; as noted, the receipt of any additional public records had no affect on the ability of Asay's counsel to allege this claim earlier. Accordingly, Asay's contentions concerning Thomas Gross must be viewed as time barred and procedurally barred, in violation of the two year rule. See, e.g., Jones v. State 24 Fla.L.Weekly S145, S148 (Fla. March 25, 1999) (trial court did not err in finding defendant's Brady claim procedurally barred, even though proceeding was defendant's first postconviction motion, where defendant added claim in untimely amendment and never satisfactorily explained why matter not asserted earlier, despite alleged reliance upon public records disclosure); Mills v. State,

684 So.2d 801, 804 (Fla. 1996) (finding Brady claim procedurally barred in successive motion, in absence of explanation as to why matter not presented within one year of discovery, through due diligence). As the State asserted this argument to the Court below (PCR XVII 478-9), procedural bar can properly be found at this juncture.

To the extent that this Court does not view this matter as procedurally barred, the State would nevertheless contend that under the circumstances of this case, Asay is equitably estopped from obtaining any appellate relief. It is well established that a party may not take advantage on appeal of a situation which he created at trial. See, e.g., McCray v. State, 395 So.2d 1145, 1152-3 (Fla. 1980); White v. State, 446 So.2d 1031, 1036-7 (Fla. 1994). Given Asay's lack of specificity in his postconviction motion, and his counsel's affirmative refusal to specify the basis for this claim when requested, any error by the trial court in its disposition of this claim was at least partially invited by the defense. See, Valle, 705 So.2d 337 (Opinion of Wells, J, concurring in part dissenting in part) (collateral counsel's refusal to identify witness who would support scandalous allegation of judicial misconduct "contributed to trial court's error," "game of hide the evidence" expressly condemned as impermissible

postconviction tactic). While the State is aware that the majority opinion in Valle expressly held that a 3.850 movant need not formally attach affidavits to his motion, and that this Court more recently held in Gaskin v. State, ___ So.2d ___ (Fla. July 1, 1999) that a postconviction movant need not identify a witness in such pleading in order to properly state a postconviction claim, the State respectfully disagrees and would contend that as a matter of fundamental due process and fairness it is entitled to adequate notice and an ability to defend. Cf. State v. Jones, 204 So.2d 515, 519 (Fla. 1967) ("But justice, though due to the accused, is due to the accuser also."). Additionally, even if the State is not entitled to a fair ability to defend, surely the trial court is entitled to a fair opportunity to appraise the nature of a capital collateral defendant's claims before making an informed decision as to the necessity for an evidentiary hearing.

Likewise, Judge Haddock cannot be faulted if he did not fully appreciate the substance of any testimony allegedly attributed to Gross, given the fact that collateral counsel affirmatively refused to call Gross as a witness in order to formally proffer his testimony, despite the fact that he was physically present and available to do so; likewise, collateral counsel affirmatively refused to introduce into the record two affidavits allegedly

executed by Gross, from which counsel had been reading during the proceedings. The purpose of a proffer is to ensure an adequate record for review, as well as, the State would contend, a meaningful opportunity for the trial court to appreciate the significance and scope of its own ruling. Cf. Jacobs v. Wainwright, 450 So.2d 200, 201-2 (Fla. 1984); Sullivan v. State, 303 So.2d 632, 635-6 (Fla. 1974) (when trial court extended counsel the opportunity to cure any error, and counsel failed to take advantage of such opportunity, any error was invited; reversible error cannot be predicated upon conjecture). Collateral counsel's failure to adequately proffer Gross' alleged testimony is comparable to the impermissible postconviction tactic condemned by this Court in Jones v. State, 678 So.2d 309, 313-4 (Fla. 1996). In such case, collateral counsel secured the attendance at an evidentiary hearing of a witness whom Jones claimed was "the real killer." Collateral counsel refused to call this witness stating that "everybody knew" that the witness would deny committing the crime, if called to testify. This Court observed that, in the absence of an adequate proffer, it did not in fact know what the witness would have said, and held that Jones had failed to sustain his burden of proof as to the admissibility of an out of court statement attributed to this witness. While the circumstances in

Jones can be viewed as somewhat dissimilar, the end result should remain the same -- counsel's failure to properly proffer the testimony of an available witness should constitute waiver or a finding that the requisite burden of proof has not been met.

Additionally, the trial court's ruling was also no doubt materially influenced by collateral counsel's repeated misstatements of the law concerning prosecutorial disqualification. Asay's counsel asserted that prosecutor DeLaRionda, who as the former trial prosecutor was unquestionably the most experienced and appropriate prosecutor to represent the State in any postconviction proceeding, had to be disqualified from any further participation in the collateral proceedings, because he allegedly would be a defense witness; after Judge Haddock quashed collateral counsel's subpoena for prosecutor DeLaRionda, collateral counsel literally wasted not a single second in asserting that the prosecutor had to be disqualified as he would likely be a state rebuttal witness (PCR XVII 453, 476-7). Collateral counsel repeatedly asserted that DeLaRionda's presence would taint the proceedings and would constitute a violation of the Canon of Ethics (PCR XVII 42-44; XX 1078-79); likewise, collateral counsel assured the court that "the appellate law" was all on Asay's side and maintained that the wrong decision by the court could mean that "we will end up back here in

two years or three years doing the whole thing all over again." (PCR XVII 483). The problem with all the above is that "the appellate law" was, and is, most assuredly not on Asay's side, and the one case cited by collateral counsel, Meegs v. McClure, was totally inapplicable to capital collateral litigation.

In fact, in Scott v. State, 717 So.2d 908, 911 (Fla. 1998), this Court expressly held that disqualification of a prosecutor under circumstances comparable to these was not required, observing that to hold otherwise "would bar many trial level prosecutors -- who may be the most qualified and best prepared advocate for the state -- from representing the State in a Brady claim in a subsequent postconviction evidentiary hearing." Scott is in accord with other comparable precedent. See, e.g., State v. Christopher, 623 So.2d 1228 (Fla. 3rd DCA 1993); State v. Clausell, 474 So.2d 1189 (Fla. 1985); State ex rel Oldham v. Aulls, 408 So.2d 587 (Fla. 5th DCA 1982).[5] Although this Court had not yet decided Scott at the time of the proceedings below, counsel for both parties were aware of the trial court's disposition of this matter, and the

[5] While these precedencts would seem to have only addressed the situation in which the defense, as opposed to the State, wished to call the prosecutor in postconviction proceedings, appellee would contend that, given the nature of capital postconviction proceedings, and most particularly the absence of a jury, these holdings should be equally applicable when the prosecutor turns out, at the last minute, to be a vital state rebuttal witness.

State pointed out that in fact the prosecutor therein had been allowed to testify without disqualification, and further pointed out that such had occurred in other capital collateral cases throughout the state; the State offered to have DeLaRionda testify first, so as to avoid any appearance of taint. To say that collateral counsel responded to these offers or assertions with scorn would be an understatement (PCR XVII 478-481). While Appellee recognizes this Court's preference for evidentiary hearings in the initial round of postconviction litigation, the State should not have had to unnecessarily suffer the loss of prosecutor DeLaRionda in order to accomplish such result. As collateral counsel's repeated misstatements of the law in all likelihood contributed to the Court's ruling below, Asay should be estopped from securing any appellate relief in regard to this matter.

To the extent that this Court does not view waiver or estoppel dispositive of this claim, the State would contend that no valid basis for relief was validly proffered under Strickland, Brady, or Giglio; as Asay's trial counsel testified that he was unaware of any of these matters (PCR XVII 513-17), it is difficult to see how any allegation of ineffective assistance of counsel could lie. See Williamson v. Dugger, 651 So.2d 84, 88 (Fla. 1995); Roberts v.

State, 568 So.2d 1255, 1259 (Fla. 1990). Even taking the allegations attributed to Gross at face value, it is likewise clear that no valid claim under Brady or Giglio would lie. This is due in large part to the relative insignificance of Gross to the State's case (a matter more fully detailed in point IV, infra), such that materiality is lacking. This conclusion is also true, however, given the fact that the allegation themselves do not state a valid basis for relief.

Gross testified to two primary matters at Asay's trial -- that Asay confessed to him in their jail cell, and that Asay had racial tattoos on his body (OR 751-760). While it was alleged by collateral counsel that prosecutor DeLaRionda pointed out photographs of Asay's tattoos to Gross (PCR XX 1058), Asay has never alleged that, in fact, he does not bear these tattoos on his body, and any testimony from Gross to this effect was not "false"; interestingly, collateral counsel has elsewhere contended that Asay's trial counsel was ineffective for failing to call Douglas Stephens as a witness, a Texas inmate who placed these tattoos on Appellant, and who, presumably, would have offered even fuller details concerning them (Stephens deposition at 10) (Initial Brief at 92).

Further, while it is asserted that Gross would testify that, in fact, Asay never confessed to him (PCR XX 1057), there is no specific allegation that prosecutor DeLaRionda knew this or that Gross' statement to him to the contrary was false. Under collateral counsel's theory, the prosecutor asked Gross a leading question, smiled and winked, and Gross thereupon told him that Asay had confessed to him; at most, the prosecutor suggested to Gross how to "word" or "reword" his answers to the jury (PCR XX 1058-1060). The above does not constitute a specific allegation that the prosecutor knowingly presented false testimony, in that even under this scenario, it is not alleged that prosecutor DeLaRionda "knew" that Gross was lying to him. Finally, even if, as is alleged, prosecutor DeLaRionda threatened Gross with a perjury prosecution if he deviated from his prior sworn statement of October 23, 1997 (PCR XX 1061), such fact would not be probative of perjury. Gross' testimony in 1987 and 1988 was always consistent, and it would not have been untoward for the prosecutor to have advised a witness to adhere to his prior sworn testimony; indeed, the prosecutor did no more than Asay's own counsel did, when, following Gross' refusal to give a deposition in November of 1987, he threatened Gross with a prosecution for contempt for failing to honor the subpoena (State's Exhibit #2; Deposition of November 24,

1987). Despite the scandalous and salacious nature of these allegations, confidence in Asay's convictions and death sentences remains unshaken.[6]

In support of these last allegations regarding the prosecutor's alleged threats to Gross, collateral counsel sought, through public records, copies of "any and all files relating to any and all homicide cases prosecuted and/or investigated by [the Duval County State Attorneys Office] between the dates of June 1, 1987 and December 31, 1998," filing an eventual motion to compel in this regard (PCR II 214-18; PCR(S) I 72-4, 77-82). For reasons known only to collateral counsel, all of these motions/requests, however, were filed well after the evidentiary hearing in this cause had concluded. To describe these public records requests as overbroad and burdensome would be to bestow upon them a great

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[6] It should also be observed, of course, that even under the proffer attributed to Gross, he is a rather prolific perjurer, in that he admits lying under oath no less than three times during the course of the initial Asay prosecution. It would also appear that Gross is a particularly patient perjurer, inasmuch as, according to the alleged proffer below, the prosecutor promised Gross reduction of his sentence within sixty days of his testimony at Asay's trial (PCR XX 1060). Asay's trial concluded in 1988, and yet Mr. Gross, whom one would expect to feel particularly aggrieved, did not come forward until eight years later in 1996. The United State Supreme Court held in Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), that habeas corpus could properly be summarily denied when based upon contentions which are "in the face of the record wholly incredible." Such principle would seem to have obvious application *sub judice*.

compliment. The alleged justification for these requests was to locate the photograph which Gross purportedly saw in the prosecutor's office during their meeting; of course, confirmation of the existence of this meeting says nothing as to what was actually discussed therein. Determinative of this claim, however, is the fact that collateral counsel did nothing to call their motion to compel up for hearing below, and, indeed, secured no ruling upon it, thus waiving any claim for appellate review. See, e.g., Gaskins v. State, supra; Johnston v. State, 708 So.2d 590, 592-3 (Fla. 1998); Lopez v. Singletary, 634 So.2d 1054, 1058 (Fla. 1993); Armstrong v. State, 642 So.2d 730, 740 (Fla. 1994); Richardson v. State, 437 So.2d 1092, 1094 (Fla. 1983). The circuit court's denial of postconviction relief should be affirmed in all respects.

POINT III

DENIAL OF ASAY'S CLAIM OF INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE WAS NOT ERROR.

Asay contended, as Claim XIII of the 3.850 motion, that David rendered ineffective assistance at the penalty phase by failing to investigate and present mitigating evidence about Asay's abusive childhood, alleged history of substance abuse (including "huffing" solvents), and alleged mental health deficiencies. The claim also

suggested that counsel should have rebutted the State's theory of racial motivation. Asay received an evidentiary hearing on this claim, and David, members of Asay's family, and mental health experts retained by collateral counsel testified. The court also considered documentary exhibits, including depositions and the report and notes of the original mental health expert retained by trial counsel. In his final order, Judge Haddock set forth in detail his rationale for concluding that Asay failed to demonstrate deficient performance of counsel and prejudice under Strickland v. Washington, 466 U.S. 668 (1984) (PCR II 269-273). Asay has failed to demonstrate any basis for reversal, and the denial of relief on this claim should be affirmed in all respects.

A. Relevant Facts Of Record

David called two penalty-phase witnesses on Asay's behalf--his mother, Veronica Baumgartener, and Ernest Miller, a psychiatrist with experience in the field of alcoholism (OR 1013-1031). He asked Miller hypothetical questions about the effect of consuming alcohol on a male of Asay's size, and Miller testified that such consumption would affect an individual's ability to make a rational judgment (OR 1017-18). Asay's mother testified that he was the youngest of her children, was twenty-three at the time of the offenses, and had grown up in Avon Park, Georgia and Jacksonville

(OR 1024-25). She stated that of all her children, Asay "was the one that did the most for me around the house and such as that" and that she was closer to him than to any of her other children (OR 1026, 1031). She testified that Asay was close to his siblings and doted on his nieces and nephews, offering family photographs in support thereof (OR 1027). She stated that Asay lived with her and paid rent prior to his arrest and that he did extensive renovations and repairs around the house, remodeling and paneling and tiling the kitchen floor and front porch (OR 1027). She told the jury that he could be rehabilitated and pointed out that while incarcerated in Texas he received his GED and took other courses. She stated that he corresponded regularly with family members (OR 1024-25, 1030) and that during his incarceration in this case, he repeatedly asked her to bring extra clothing that he wanted to share with needy fellow inmates (OR 1029-30).

In closing, David argued that two of the aggravators--being on parole for auto theft and contemporaneous conviction of two murders--were not entitled to great weight and that the CCP aggravator, asserted only in regard to the McDowell murder, was not supported by the evidence (OR 1052-56). As to mitigation, David argued that the jury should consider Asay's age at the time of the murder and how Asay conducted himself while previously

incarcerated--“when he was in prison in Texas he did okay, and did things that helped him become a better human being . . . he did, in fact, better himself while he was in prison. He didn’t just vegetate.” (OR 1056). David also argued that, in light of Miller’s testimony, Asay’s ability to conform his conduct to the requirements of the law was substantially impaired, a statutory mitigator, and pointed to the testimony of Bubba O’Quinn and Robbie Asay concerning Asay’s alleged consumption of alcohol the night of the murders (OR 1056-57). Likewise, David pointed out that the jurors could consider “any other aspect of [Asay’s] character or record” in mitigation and drew their attention to his mother’s testimony concerning Asay’s love for his family, pointing out that his concern for his nieces and nephews “shows he’s actually a real person.” (OR 1058). David argued that there was good in Asay and that, to do justice, the jury should recommend life (OR 1064).

At the evidentiary hearing, David testified extensively about his preparation for the trial and penalty proceedings (PCR XVII 497-628; XVIII 633-697). David stated that Asay’s prior attorney, Louis Buzzell, arranged for Asay to be examined by a psychologist, Dr. Vallely (PCR XVII 521-2), pursuant to Florida Rule of Criminal Procedure 3.216, to determine, *inter alia*, the existence of mental mitigation (OR 30-2). David further testified that Vallely’s

report was extremely unhelpful, if not affirmatively harmful, and that, accordingly, he decided not to call Vallely as a witness or to further pursue mental mitigation (PCR XVII 545-7; XVIII 640-4, 682). The State introduced this report and Vallely's notes as an exhibit (PCR XVIII 646; PCR(S) I; State's Exhibit #1).

David specifically noted that Vallely's report included Asay's statement that he only consumed beer and no drugs the night of the murders, as well as the doctor's opinion that Asay's recall of events prior to and after the murders was inconsistent with any true alcoholic blackout (PCR XVIII 647). According to David, the report also included Vallely's finding that Asay had no history of drug or alcohol abuse consistent with neuropsychological problems and did not present a history consistent with neurological problems. Vallely diagnosed Asay as having an anti-social personality disorder and described him as manipulative and deceptive (PCR XVII 547; XVIII 647-9). David also testified that Vallely's notes indicated awareness of Asay's hatred of blacks, glue-sniffing (or huffing) while in prison, and abuse as a child (PCR XVII 650-2). David testified that, in light of the above, he declined to have Miller, whom he knew, formally examine Asay, so he could utilize hypothetical questions that would not open the door to the admission of unhelpful specifics (PCR XVII 657-62).

David also testified that he had access to Buzzell's written notes of his interviews with Asay's mother, in which she stated that Asay had "extensive behavioral problems in school" and problems in prison in both Texas and Florida. The Florida prison specifically described Asay as being "explosively hostile" and likely "to hurt someone if not taken care of" (PCR XVIII 652-3). David testified that he used an investigator to obtain information about Asay's background, but that neither Asay nor his family was forthcoming or cooperative (PCR XVII 504, 527; XVIII 640-2). David testified that Asay himself stated that if convicted he would not receive the death penalty because he had "only killed a nigger and a faggot." (PCR XVIII 642). Both Asay and his mother sent the investigator on "wild goose chases," including a pointless trip to Tampa (PCR XVIII 640-2). At one point, Asay's mother pretended to be his aunt in order to mislead the investigator, which greatly amused Asay and his mother (PCR XVIII 641-2). Investigator Moncrief reported that he attempted to obtain possible mitigation evidence from Asay's family members, but was unsuccessful (PCR XVIII 642). David testified that he knew that Asay's childhood was less than "great" and that he had some "problems," even though he failed to get anything "of worth" from Asay's mother (PCR XVII 525-7; XVIII 653). David testified that he felt that it would be best

to call Asay's mother to "say some nice things" rather than getting into "some of these other things that led . . . into the closet and trouble for Mr. Asay." (PCR XVIII 657). He stated that Asay's mother would "be able to highlight what we needed from the family" and that her testimony that Asay was a caring son would show that he "wasn't an animal" (PCR XVIII 672-3).

David was confronted with some of the evidence that collateral counsel contended he "should" have presented--extensive accounts of abuse within the Asay household and testimony that allegedly would dispute Asay's status as a racist. David testified that, even if available, he would not have pursued these matters or presented this evidence. He stated that some of the allegations of abuse seemed almost "surreal" and that the matter was something of a two-edged sword, as it highlighted Asay's exposure to violence in the past and could suggest that he was an abuser or a violent person now (PCR XVII 522; XVIII 656-7). David testified that he would not have called the inmates from Asay's past who countered the racism charge because they themselves were racists and would have opened the door to testimony concerning Asay's disciplinary problems in prison (PCR XVIII 663-4, 688-693). David likewise thought that the testimony of Joe Collins, a former prison officer in Texas, would not have been helpful (PCR XVIII 663-4, 688-693). It would have

been difficult to present any argument that Asay's racist tattoos had been for "protection," given the fact that he had been assaulted primarily by white inmates (PCR XVII 535-6).

Collateral counsel presented the testimony of five of Asay's siblings to detail the emotional and physical abuse they suffered at the hands of their mother, father, and/or stepfather (PCR XIX 858-903, 921-1016). Not all of the testimony was consistent or helpful to Asay, however. For example, Asay's brother, Joseph Asay, testified that Asay threatened to stab his wife and father-in-law. Joseph Asay repeated these threats to Asay's parole officer and also stated that he believed that Asay stabbed his dog (PCR XIX 888-893). Asay's sister, Tina Logan, testified that their mother showed more attention to Asay than to the other children (PCR XIX 928). She also stated that she spoke to David (PCR XIX 956-7). Mrs. Logan further testified that she considered Asay a "threat to others" when he was released from prison in 1987 and confirmed that she knew of Asay's attempt to stab his sister-in-law (PCR XIX 961). Both Gloria Dean and Mary Fox testified that Asay's father, Otto Asay, had not been involved with the male members of the family, or abused them, and that neither parent sexually abused Asay (PCR XIX 967, 984, 989). Robbie Asay testified that their mother was not abusive to Asay (PCR XIX 1006).

Counsel also called Johnny Sharp, a black former inmate with whom Asay had a sexual relationship while incarcerated in Tomoka (PCR XX 1128-1205). Sharp testified that he did not know that Asay had racist tattoos on his body, but later contradicted himself and said that he had seen them and that he did not judge a man by his tattoos (PCR XX 1148-1150, 1181). Sharp also stated that he witnessed a confrontation between Asay and another white inmate and that Asay was "at ease" with black inmates (PCR XX 1157). Sharp stated that he met Asay through another black inmate named "Sneaky Perry" (PCR XX 1159).

Collateral counsel also called two mental health experts who examined Asay in 1993 (Dr. Sultan) and in 1996 (Dr. Crown), at least six years after the murders. Crown, a diplomate in neuropsychology, interviewed Asay, administered a battery of neuropsychological tests, and provided no written report (PCR XVIII 704-5, 707-8). Crown opined that both statutory mental mitigators applied due to Asay's alleged (but unspecified) impairment and his alleged inability "to figure things out" (PCR XVIII 708-713). In reaching his conclusions, Crown relied upon Asay's having "huffed" solvents while incarcerated in Texas, as well as his allegedly having been stung by bees at age three, leading to the presence of neurotoxins in his brain (PCR XVIII 719-20). None of Asay's

siblings, including his primary caretaker, recalled the incident involving the bees (PCR XIX 979). On cross-examination, Crown was shown documents purportedly handwritten by Asay, analyzing the depositions and sworn statements in the case and proffering strategy notes to himself and/or his attorney. Crown indicated that this did not change his opinion as to Asay's ability to plan (PCR XVIII 741-2). Crown did not review any trial transcripts and, indeed, was totally unfamiliar with the facts of the case (PCR XVIII 750). Asay never discussed the crimes with him (PCR XVIII 761-2), and Crown pronounced that the facts of the case were not important to a neuropsychologist in determining the existence of mitigating factors (PCR XVIII 754). Crown stated that Asay's racist tattoos were of no import to him and that he was only aware of Asay's prior record "in a most global fashion" (PCR XVIII 752, 756). Crown conceded that the prison records he relied on indicated a propensity to violence on Asay's part and that Asay, in various forms filed with the Department of Corrections, previously described his relationship with his parents as good and characterized the stability of the home as good (PCR XVIII 756-7).

Sultan, a clinical psychologist, testified that she administered a battery of tests to Asay and that the results indicated, *inter alia*, low-average intelligence (PCR XVIII 787).

She found that Asay's "huffing" solvents while in prison might be a "significant indication of a possible organic problem" (PCR XVIII 794-5) and, like Crown, testified that both statutory mental mitigators applied and that nonstatutory factors such as abused childhood, substance abuse, and organic brain damage were present (PCR XVIII 818-19). Nevertheless, on cross-examination she agreed with Vallely's diagnosis of Asay as having an anti-social personality disorder and stated that she could not disagree with his description of Asay as "manipulative and deceptive." (PCR XIX 833, 846). She also observed that his notes showed that Vallely clearly was aware of beatings and sexual abuse in the Asay household, as well as Asay's huffing solvents (PCR XIX 831-2). Sultan testified that mental health experts could reach differing conclusions based on similar data (PCR XIX 849). She testified that, despite any impairment, Asay was capable of some planning and stated that violent acts were part of his mental condition (PCR XIX 835, 843). Sultan conceded that the prison records she relied on stated that Asay had an escalating pattern of violence and that incarceration had not served as a deterrent (PCR XIX 847-9). Sultan stated that Asay was "confused" about blacks and that he was a "non-intellectual racist" (PCR XIX 850, 853). However, she could not name any inmate who had racist tattoos placed on his body for

any nonracist (or intellectual) reason (PCR XIX 853-4). Like Crown, Sultan was unfamiliar with many facts of the case, including Asay's contemporaneous statements of racial motivation (PCR XIX 842).

Both parties also introduced documentary exhibits, with the State introducing Valley's report of October 12, 1987, and his notes (State's Exhibit #1). Vallely stated in the report that he administered thirteen tests, including the MMPI and WAIS-R, the latter test resulting in an IQ or score of 84. Vallely found the test results consistent with an anti-social personality disorder, that no emotional or cognitive disturbance was noted, and that no signs of psychotic processes were apparent from the testing. Additionally, the testing showed neuropsychological functioning well within normal limits and intellectual functioning within the low average range. Vallely noted that Asay gave a detailed account of the night of the murders, both before and after, although claiming a "blackout" at the time of the crimes themselves. Vallely specifically disbelieved this account, describing it as "transparently but consciously manipulative and probably deceptive." He noted that, while Asay had been sexually assaulted in prison, two of these assaults were by white prisoners, and that Asay did not report the attacks and falsely claimed to be

homosexual. Vallely described Asay as manipulative and deceptive and stated that no history of drug or alcohol use given was consistent with long term neuropsychological problems. In his notes, Vallely indicated that Asay told him that he used or huffed solvents in prison in Texas. He also indicated awareness of an auto accident that did not result in head trauma. His notes indicate that Asay told him of physical abuse and brutal beatings by his stepfather and that his brother Joey attempted to sexually assault him. Asay told him that he was a below average student and was sent to a boys' home at age seventeen and from there to prison. Between the ages of sixteen and twenty-two, Asay was out of prison for only one year. Vallely's notes also include such notations as "consistent discipline problems in prison" and "hatred of blacks" (State's Exhibit #1).

The voluminous background materials utilized by Crown and Sultan were likewise introduced. Had the redundant matters been excised, their size would be greatly reduced (Defense Exhibit #4). Asay's parole and probation records (Defense Exhibit #4, Tab 7), indicate that his probation was revoked once, his parole was revoked once, and he escaped from custody twice. Beginning in 1980, the records show continuous commission of offenses such as auto theft, escape, and burglary in Florida, Georgia, and Texas.

A 1981 screening report includes an IQ of 84 and a finding of lack of psychosis and describes Asay as an escape risk. At that time Asay indicated that he had a good relationship with both parents and that the stability in the home was good. A probation record from April 1987 contained complaints about Asay's threats to Joey, Asay's father-in-law and wife and information pertaining to Asay's attempts to stab the father-in-law and the stabbing of the dog. When the probation officer advised Asay that he faced a violation of probation, Asay responded that he would abscond. Defense Exhibit #4 also contains Asay's prison records. Those from Florida indicate that, between 1981 and 1986, he received sixteen disciplinary reports, including some for fighting, choking another inmate, and spitting on an officer (Defense Exhibit #4, Tabs 8 & 9). The documents include a notation in February 1986 that Asay was a management problem and a demonstrated security risk, and a complaint filed by Asay in April 1990 that white inmates should have access to white barbers. Also included in the packet are Asay's school records from Georgia for 1973-1976, describing him as having a less than perfect attitude (Defense Exhibit #4, Tab 13).

Asay also introduced depositions of the Texas witnesses--David Hunter, Joe Collins, and Douglas Stephens (PCR II 284-368; Supplemental Record). Hunter stated that he was Asay's "role

model" in the Texas prison and looked out for him. (PCR II 346). Hunter is a member of the Aryan Brotherhood and has a number of racist tattoos himself, such as a Swastika and a "White Pride" tattoo. Douglas Stephens tattooed both him and Asay (PCR II 304, 311). Hunter is serving a one-hundred-forty-nine-year sentence for aggravated robbery and is also under psychiatric treatment (PCR II 306, 314). He agreed that it would be fair to say that he did not like blacks and stated that he did not think that blacks should be around and that they "need to go back where they came from." He further stated that Asay had "close friends" in the Aryan Brotherhood (PCR II 308, 321, 295). Hunter stated that when Asay huffed solvents he became more and more aggressive, especially toward blacks (PCR II 298-300).

Stephens confirmed that he tattooed Asay with "White Pride" and "Klansman" (Deposition at 10). Stephens stated that he was Asay's "best friend" and that other inmates picked on Asay (Deposition at 7-8). He said that he was a member of the Aryan Brotherhood and that Asay referred to blacks as "niggers," although he allegedly did not like to do so (Deposition at 9, 19-20). Joe Collins is a retired psychologist and assistant warden with the Texas prison system (PCR II 334-5). He stated that Asay complained to him of being beaten by black inmates (PCR II 340). Collins

administered psychological tests to Asay and determined that he suffered from no major mental illness and, in fact, was a sociopath, i.e., someone with an anti-social personality disorder (PCR II 345, 349). Collins was unaware of the facts of the Florida murders and that Asay was on parole when he committed them (PCR II 358-9).

Following presentation of this evidence, Judge Haddock rendered a detailed order denying relief (PCR II 262-273). Regarding mental mitigation, Judge Haddock expressly found that David made a reasonable tactical decision in not calling Vallely, given the harmful nature of his report (PCR II 269). The judge found that David was not required to investigate mental mitigation further under these circumstances:

> This Claim alleges ineffective assistance of counsel at the penalty phase. With regard to the issue of 'serious mental and emotional health problems', the defendant was examined and evaluated by Dr. Vallely, a psychologist who has testified as an expert witness numerous times in this jurisdiction. Mr. David received and reviewed Dr. Vallely's report. As he testified in the evidentiary hearing, Mr. David made a reasonable decision that Dr. Vallely's testimony would not be helpful to the defense; in fact, he testified that introduction of Dr. Vallely's report 'would hurt Mr. Asay more than it would help him'. As Mr. David testified, Dr. Vallely's report stated that Mr. Asay did not present a history consistent with neurological problems, and that his test results were consistent with

anti-social personality disorder. The report also characterized Mr. Asay as deceptive and manipulative. Additionally, Mr. David testified that some of Dr. Vallely's notes made reference to Mr. Asay's hatred of blacks, his glue sniffing in prison, and possible sexual abuse by his stepfather, thus indicating that the expert was aware of all these matters in the defendant's background, prior to issuing his opinion with regard to the defendant's mental health.

Mr. David was entitled to rely on Dr. Vallely's report, and is not required, in order to be an effective advocate, to obtain another expert. Mr. David's decision not to have Dr. Miller examine Mr. Vallely is therefore reasonable, especially considering his testimony that, based upon his prior dealings with Dr. Miller, he preferred to ask the doctor hypothetical questions. Declining to call a witness whose testimony is unfavorable is not ineffective assistance of counsel. Bryan v. Dugger, 641 So.2d 61 (Fla. 1994); Ferguson v. State, 593 So.2d 508 (Fla. 1992). Dr. Vallely noted that he had not detected any signs of an emotional or cognitive disturbance, or of a psychotic process, and that he found the defendant's IQ to be within the low/average range, with normal frontal lobe functioning. He also reported that the defendant told him he had only consumed beer that night, that he recalled the events before and after the murders, and that, while sexual assaults were committed against him in prison, the two in Texas has been committed by white men, and the assault by a black inmate had occurred in Florida, not Texas. All of these statements in Dr. Vallely's report substantiate the reasonableness of Mr. David's decision not to use Dr. Vallely as a witness. The fact that the defense has now secured a new expert who offers testimony more favorable to the defense

> is not a sufficient basis for finding ineffective assistance of counsel. Turner v. Dugger, 641 So.2d 1075 (Fla. 1992); Rose v. State, 617 So.2d 291 (Fla. 1993).

(PCR II 269-70).

Judge Haddock made specific findings regarding Crown and Sultan's credibility, or lack thereof, finding as to the former:

> While on the subject of mental health, specifically the testimony at the evidentiary hearing of the two collateral experts, Dr. Crown and Dr. Sultan, the Court finds that the testimony of Dr. Crown was completely lacking in credibility. Dr. Crown's interesting theory of the defendant's condition being caused by huffing solvents while incarcerated and having been attacked by bees when he was three years old, such bee attack having left 'neurotoxins' in his brain, seems to have been so overwhelming in the formulation of his opinion that he chose to ignore the entire trial transcript, chose not to discuss the actual murders in any way, shape or form with the defendant, opined that the defendant's feelings toward blacks were irrelevant, and felt a need to be aware of information about these crimes only 'in a most global fashion.'

(PCR II 270-1).

After noting that the account of the "attack by bees" was not corroborated by any family members (PCR II 271), Judge Haddock made his findings as to Sultan:

> Dr. Sultan's testimony was of minimal impact, and she agreed that her evaluation of the defendant was not inconsistent with Dr. Vallely's diagnosis. She acknowledged that the defendant was able to plan. She described

> the witness as a 'nonintellectual racist'. Like Dr. Crown, Dr. Sultan was unfamiliar with a number of aspects of the evidence in this case which tended to demonstrate mental competence and ability to premeditate, such as the defendant's statements that he was racially motivated in this crime, his statements to Mr. O'Quinn that he shot McDowell because he had beaten him out of ten dollars in the past, his statement to Danny Moore that there had been a plan to kill, and the defendant's attempt to change the appearance of his truck after the murders. Dr. Sultan's description of Asay as a 'nonintellectual racist' boggles the mind in light of the fact that the defendant had a number of racist tattoos placed upon his body. In conclusion, there is no reasonable probability of a different result at sentencing, had either or both Dr. Crown and Dr. Sultan been called by the defense in the penalty phase. Certainly these witnesses would have provided insufficient basis for judge or jury to overcome the aggravating circumstances which were proven. At best, their opinions were speculative.

(PCR II, 271-2).

Concerning counsel's failure to present family background or Asay's conduct in prison or alleged lack of racism, Judge Haddock again found that David performed reasonably. He noted that David called Asay's mother at the penalty phase and elicited favorable testimony from her, despite her lack of cooperation (PCR II 272). The court additionally found:

> Mr. David testified that he made a reasonable and logical decision that matters about the defendant's abused childhood could constitute

'double-edged swords'. (T 88-90, 223). Testimony about childhood abuse and testimony of the Texas witnesses were the types of things that, according to Mr. David's testimony 'led, I thought, into the closet and trouble for Mr. Asay.' (T 223, 239, 252-253). Mr. Asay's prison record, in fact, has a number of disciplinary reports, indicating that he was not in fact such a good prisoner. Mr. Asay's family, many of whom testified at the evidentiary hearing as to physical and mental abuse suffered by all of the family members when they were growing up, including Mr. Asay, did not come forward with this type of information in 1988. Neither Mrs. Baumgartner nor the defendant volunteered any of this information, nor did they suggest such testimony could be obtained from other family members. Additionally, none of the siblings have committed any antisocial act on the par or first degree murder, despite suffering the same childhood abuse. Mr. David conducted a reasonable investigation for mitigation. The defense has failed to demonstrate any prejudice in this area or any reasonable probability that a different sentence would have been imposed, had the additional family evidence been presented.

In addition, Mr. David gives reasonable testimony that a competent attorney would have believed that there were risks involved with offering this type of testimony, especially in light of the picture presented during the evidentiary hearing of a family at war with itself, committing domestic violence and inflicting permanent damage to one another at an early age. A reasonable person could well anticipate that a jury might find corroboration of a belief in the defendant's violence, rather than mitigation, in this testimony. Additionally, the lengthy passage of time since this childhood abuse occurred, and the fact that none of the siblings have

> become murderers, indicates that a reasonable sentencer could quite well have found no significant weight to be attached to the testimony. No relief is warranted as to this claim.

(PCR II 272-3).

B. Deficient Performance and Prejudice Have not Been Demonstrated Under ***Strickland v. Washington***

Asay contends that David rendered ineffective assistance at the penalty phase in two primary respects--failure to present mental mitigation and failure to present testimony concerning Asay's abused childhood and/or nonracist behavior in prison. Despite being afforded an evidentiary hearing, Asay failed to prove his case. Based on Vallely's report, David had no basis to believe that pursuing mental mitigation would be helpful, and he made a valid strategic decision not to do so. Through his investigator, David attempted to investigate Asay's background, but received little or no cooperation from Asay and his family. David's decision to call Asay's mother to present positive, rather than negative, testimony, was eminently reasonable under the circumstances. To the extent that any deficiency of counsel is perceived, Judge Haddock correctly found a lack of prejudice. As to the mental health mitigation, Judge Haddock, as was his prerogative, found the new mental health experts retained by

collateral counsel less than credible, and it is clear that their attempts to rationalize or mitigate Asay's racially motivated double murders were patently unconvincing. Judge Haddock correctly found the testimony regarding the alleged child abuse would have been entitled to little weight under the circumstances of this case, given the findings in aggravation, as well as the remote nature of this testimony and the fact that Asay's siblings did not commit comparable crimes. It is clear that a more detailed exposition of Asay's past, including while incarcerated, would not have been helpful and would have opened the door to Asay's propensity toward violence and anti-social behavior. The court's denial of relief should be affirmed in all respects.

The United States Court of Appeals for the Eleventh Circuit has set forth pertinent precedents regarding ineffectiveness claims, usually in the course of reviewing habeas corpus appeals brought by Florida capital defendants. Thus, in Atkins v. Singletary, 965 F.2d 953, 958 (11th Cir. 1992), the court cautioned that the performance "prong" of Strickland v. Washington was not a "high standard," involving "what the ideal attorney might have done in a perfect world or even what the average attorney might have done on an average day," but rather "whether a particular counsel's conduct was reasonably effective in context." White v. Singletary,

972 F.2d 1218, 1220-1 (11th Cir. 1992) ("The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at trial could have acted, in the circumstances, as defense counsel acted at trial."). The Eleventh Circuit emphasizes that deference should be afforded counsel's performance and any strategic decisions rendered and has held that the cases in which defendants may properly prevail on claims of ineffective assistance are "few and far between." Rogers v. Zant, 13 F.3d 384, 386 (11th Cir. 1994). The court recognized that there are "countless ways to provide effective assistance of counsel," and the fact that different counsel, such as present collateral counsel, might choose a different strategy does not mean that trial counsel's performance was deficient. Provenzano v. Singletary, 148 F.3d 1327, 1331 (11th Cir. 1998); Card v. Dugger, 911 F.2d 1494, 1507 (11th Cir. 1990). In Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995) (*en banc*), the court wrote, "that other witnesses could have been called . . . proves that at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific portions of a made record, postconviction counsel will inevitably identify shortcomings in the performance of prior counsel." The court has also held that there

is no *per se* requirement that defense counsel present mental mitigation, Waters, or evidence of a defendant's abused childhood, Marek v. Singletary, 62 F.3d 1295, 1300 (11th Cir. 1995), in order to render effective assistance.

Judge Haddock's finding that David made a reasonable tactical decision not to call Vallely, whose report was unfavorable, is supported by competent substantial evidence (PCR II 269-270). David's testimony that Vallely's report would "hurt Mr. Asay more than it would help him" (PCR XVII 547) was, if anything, an understatement. The report indicated that Asay had no serious mental disorder, that his neurological tests were all within the normal range, and that no emotional or cognitive disorders were noted. No history consistent with neurological problems was given nor did Asay give a history of drug- or alcohol-related matters consistent with long-term neuropsychological problems. The report described Asay as "transparently but conspicuously manipulative and probably deceptive," specifically discounted any claim of alcoholic blackout on Asay's part, and noted that, although Asay was assaulted in prison, it was, for the most part, by white inmates (State's Exhibit #1). The most that could be said was that Asay had an anti-social personality disorder. A reasonably competent attorney in David's position could have concluded that further

investigation of Asay's mental state would not be beneficial and that Vallely would not be a helpful witness. This Court has consistently upheld strategic decisions of counsel under circumstances identical to this. Bryan v. Dugger, 641 So.2d 61, 64 (Fla. 1994); Ferguson v. State, 593 So.2d 508, 510-11 (Fla. 1992); Medina v. State, 573 So.2d 293, 297-8 (Fla. 1990). The argument that David did not supply Vallely with sufficient background information concerning Asay is clearly refuted by Vallely's notes, indicating that he was aware of all pertinent matters and that they did not persuade him to render a favorable report. (See State's Exhibit #1). Vallely's notes also indicate that he was aware of physical and sexual abuse, that Asay "huffed" solvents in prison, that he was described as a "discipline problem" in prison, and that he hated blacks. In light of this evidence, David's decision not to call Vallely and to rely on Miller, who never examined Asay, and ask him hypothetical questions concerning intoxication was not unreasonable.

To the extent that any deficiency of counsel is perceived, the court correctly found no prejudice under Strickland v. Washington. Judge Haddock was entitled to assess the credibility of Crown and Sultan, and his conclusion that their testimony lacked credibility is supported by the record. Booker v. State, 441 So.2d 148, 152

(Fla. 1983) (in determining credibility of collateral experts, trial court able to judge their demeanor and hear what parts of the transcripts they had not read); Parker v. State, 611 So.2d 1224, 1228 (Fla. 1992) (trial court could properly reject collateral expert's testimony as "unpersuasive"); Rose v. State, 617 So.2d 291, 293 (Fla. 1993) (trial court could properly reject collateral expert's testimony as "farfetched and unworthy of belief"); Rutherford v. State, 727 So.2d 216, 224 (Fla. 1998) (trial court could properly discount testimony of collateral experts who could not relate defendant's alleged mental disorder to the crime itself). As Judge Haddock noted in his order, neither Crown nor Sultan was familiar with the facts of the case, including Asay's contemporaneous statements indicating racial motivation for the murders or his subsequent attempts to avoid detection by changing the appearance of his truck (PCR II 270-2). While both collateral experts dutifully opined that both statutory mental mitigators existed, neither had any basis for such conclusion and each relied upon information that was affirmatively harmful to the defense.

For instance, Crown never explained why, after twenty years, the formerly recumbent neurotoxins from the bee-stings erupted to such an extent one hot July night in 1987 that Asay murdered two individuals in downtown Jacksonville within twenty minutes of each

other, all the while uttering such remarks as, “You’ve got to show a nigger who is boss.” (OR 501, 531). Asay, of course, also indicated that he murdered the second victim, McDowell, because he had “beaten him out of ten dollars” (OR 512). While, from his lofty precipice as a neuropsychological diplomate, Crown was certainly free to propound that the facts of a given case were of no interest to a neuropsychologist, the fact remains that Asay’s sentencing jury, being composed of mere mortals as opposed to neuropsychological diplomates, was bound to feel differently. On cross-examination, Crown conceded that Asay’s prior record and prison record, a portion of the all-important background information relied upon by him, indicated a “propensity towards violence” (PCR XVIII 757-8), hardly a factor that might induce a jury to recommend a sentence of life imprisonment. Judge Haddock’s finding a lack of credibility is more than amply supported by the record.

Sultan’s testimony does not fare much better. Despite her own lack of familiarity with the facts, she disagreed with Crown on the importance of such knowledge, stating that it would be relevant along some kind of psychological continuum, presumably even to a neuropsychological diplomate (PCR XIX 846-7). Sultan also agreed with Vallely’s diagnosis of Asay as having an anti-social

personality disorder and did not question his description of Asay as manipulative and deceptive (PCR XIX 833, 846). She reasoned that, despite whatever impairments Asay had, he could still plan (PCR XIX 835) and, most devastatingly, testified that Asay's records showed an escalating pattern of violence that incarceration had not deterred, additionally opining that "violent acts" were part of Asay's condition (PCR XIX 843, 848). Again, such testimony would hardly have afforded the jury a basis for recommending a life sentence and obviously would have provided a positive incentive to recommend death. Just as Crown lost credibility with his reliance on childhood bee-stings, so did Sultan with her diagnosis of Asay as a "non-intellectual racist" who would cover his body with racist tattoos for reasons other than the obvious. Again, Judge Haddock's finding a lack of credibility is amply supported by the record.

This was not a case where mental mitigation was a promising subject. The best that can be said is that, after additional years to investigate and prepare, collateral counsel found two experts who found, at most, some ephemeral impairment that allegedly affects Asay's ability to plan. The testimony of these experts is so unconvincing in and of itself, and would be subject to such damaging cross-examination, that it is clear that no prejudice occurred from its omission from the sentencing proceedings. Bryan

v. Singletary, 140 F.3d 1354, 1360-1 (11th Cir. 1998) (no prejudice under Strickland v. Washington from counsel's failure to call experts at penalty phase where conclusions of experts inconsistent with appellant's actions in implementing the murder and attempting to cover it up and where strong aggravation existed); Bertolotti v. Dugger, 883 F.2d 1503, 1516-20 (11th Cir. 1989) (no prejudice from counsel's failure to call expert whose testimony was "inherently weak," "vulnerable to well-considered attack on several fronts," and unlikely to be found convincing by jury). Any expert of this kind would have opened the door to fuller examination of Asay's prison record which would not have been helpful, to say the least, including his escalating pattern of violence (as the defense experts themselves testified), his many disciplinary reports, and his description as a security risk and management problem. The prison records also indicated that Asay was attacked primarily by white inmates, which would not explain any use of racist tattoos as a "protective" measure. Deficient performance and prejudice have not been demonstrated regarding David's not presenting this type of mental health mitigation at the penalty phase.

The court's denial of relief on the remainder of Asay's claim that David did not present evidence of his family background, especially childhood abuse, and evidence allegedly countering his

racist motivation for the murders is also supported by the record. David tried to investigate Asay's background, but received little to no cooperation from his client or family members. David testified that he knew, at least, that Asay's childhood was "not great," but, when confronted with the detailed accounts of abuse presented at the collateral hearing, described that evidence as a "double-edged sword," believing that the jury could have concluded that Asay's exposure to violence made it more likely that he inflicted violence on others (PCR XVII 524,25; XVIII 657). David knew from Buzzell's notes of an interview with Asay's mother that unfavorable matters loomed in Asay's background such as the fact that he had "extreme behavioral problems at school" and problems in prison and had been labeled as having "an explosive attitude or episodes of explosive behavior" (PCR XVII 542; XVIII 652). Again, just as investigation into mental mitigation seemed, reasonably, to be purposeless, anyone in David's position could well conclude that investigating Asay's background would lead to nothing favorable. Using Asay's mother to offer a sanitized and optimistic view of his life can hardly be deemed unreasonable.

The testimony of Asay's mother was much more favorable to Asay than the true facts might have been, given her saying that he adjusted and behaved well in prison (which was not the case).

Judge Haddock's finding that David performed reasonably in this regard is supported by competent substantial evidence and is in accord with this Court's precedents. Rutherford, 727 So.2d at 224-5 (counsel not ineffective for failing to investigate and present evidence of defendant's family background where, *inter alia*, defendant and family members refused to cooperate and where presentation of such evidence would have conflicted with reasonable penalty-phase strategy to humanize defendant); Haliburton v. Singletary, 691 So.2d 466, 470-1 (Fla. 1997) (defense attorney's belief that evidence of defendant's childhood abuse would have been more harmful than helpful and counsel's strategy to focus on defendant's close family ties and positive influence with other inmates reasonable and not deficient performance).[7]

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[7] To the extent that this claim, see also Point IV, infra, argues that David should have presented Collins, Stephens, or Hunter at the penalty phase, David's assessment that they would do more harm than good (PCR XVII 534-7; XVIII 654, 689-694) is reasonable, given the fact that Asay's prison record was not good, that he consorted with known racists and had racist tattoos, and that he had been assaulted by white, rather than black inmates, undercutting any theory that the tattoos were for "defensive" purposes. As Judge Haddock properly found in his resolution of Claim IV, infra, no reasonable attorney would have called Sharp at any stage in the proceedings, and his testimony would have conflicted with the theory that Asay was victimized by black inmates. Further, although Collins was not an inmate, his testifying would have elicited his diagnosis of Asay as having only an anti-social personality disorder, as well as his description of Asay as a sociopath, and Collins would have been vulnerable to impeachment on the circumstances of this case, of which he was

Even if any deficiency of counsel were perceived, prejudice has not been demonstrated under Strickland v. Washington, as Asay's sentences of death have not been rendered unreliable. Judge Haddock did not err in concluding that the testimony of childhood abuse was remote and would have been entitled to little weight, given the fact that Asay's siblings had not committed violent acts themselves. Contrary to any suggestion by opposing counsel, this latter proposition of law is well settled. Williamson v. State, 681 So.2d 688, 698 (Fla. 1996) (trial court could properly afford little weight to evidence of dysfunctional childhood where defendant's siblings became productive members of society despite similar upbringing); Jones v. State, 648 So.2d 669, 680 (Fla. 1994) (same, where evidence of defendant's traumatic childhood afforded little weight given fate of siblings); Elledge v. Dugger, 823 F.2d 1428, 1447 (11th Cir. 1987) (no prejudice from counsel's failure to call family members at penalty phase as to childhood abuse where defendant's siblings led productive lives, despite exposure to similar abuse, and where witnesses would have been forced to testify about defendant's own violent actions).

As in Jones, the evidence of childhood abuse was relatively remote in time from the murders, as Judge Haddock noted. Asay was

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completely ignorant.

twenty-three at the time of these crimes and left home at age sixteen or seventeen when he first entered a juvenile facility after being convicted of auto theft (See Defense Exhibit #4, Tab 7). Since then, Asay, at most, had one year of liberty, had been released from custody several weeks before these murders, and was on parole at the time. Mills v. Singletary, 63 F.3d 999, 1025 (11th Cir. 1995) (counsel not ineffective for failing to present evidence of defendant's childhood where he was twenty-six at time of murder); Bolender v. Singletary, 16 F.3d 1547, 1561 (11th Cir. 1994) (same, where defendant twenty-seven). Further, as in Elledge, Asay's siblings, particularly Joseph Asay and Tina Logan, would have had to testify that Asay threatened to stab the former's father-in-law and that he allegedly stabbed the dog (PCR XIX 888-893; 928). That Asay's brother felt compelled to report this to Asay's parole officer can hardly be considered mitigating. Rose v. State, 617 So.2d 291, 295 (Fla. 1993) (defense counsel not ineffective for failing to call family members who would have testified that defendant was a violent person).

None of this testimony affects the three strong aggravators found in regard to these murders--prior (contemporaneous) crimes of violence, Asay's status as a parolee at the time of the murders, and that the murder of Robert McDowell was committed in a cold,

calculated and premeditated manner. McDowell was shot six times, some at close range, as he begged for his life and sought to escape. These murders were committed for the most reprehensible of motives, racial prejudice and hatred, and it is difficult to conceive of anything that could significantly mitigate them. This Court has found lack of prejudice under comparable circumstances. Grossman v. Dugger, 708 So.2d 249, 251 (Fla. 1997) (no prejudice from counsel's failure to present further mitigating evidence where facts showed such egregious conduct on part of defendant that "proof of mitigating circumstances extremely difficult"); Breedlove v. State, 692 So.2d 874, 878 (Fla. (1997) (no prejudice from counsel's failure to present additional mental health or family mitigating evidence where aggravators "overwhelmed" potential mitigating evidence presented at postconviction hearing); Bottoson v. State, 674 So.2d 621 (Fla. 1996) (insufficient prejudice to merit relief under Strickland v. Washington in regard to counsel's failure to present mental health mitigation and evidence pertaining to defendant's traumatic childhood in light of strong aggravation); Mendyk v. State, 592 So.2d 1076, 1079 (Fla. 1992) (counsel's failure to present mitigation evidence pertaining to defendant's mental deficiencies, intoxication, history of substance abuse, and difficult childhood not prejudicial in light of three strong

aggravators); Tompkins v. Dugger, 549 So.2d 1370, 1373 (Fla. 1989) (evidence of defendant's abused childhood and addiction to drugs and alcohol would not have affected the penalty in light of the crime and the nature of the aggravating circumstances).

This case bears no resemblance to those Asay relies on, such as Rose v. State, 675 So.2d 567 (Fla. 1996), Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995), Phillips v. State, 608 So.2d 778 (Fla. 1992), Lara v. State, 581 So.2d 1288 (Fla. 1991), and Bassett v. State, 541 So.2d 596 (Fla. 1989). The circuit court granted relief on the penalty phase in Lara, and it is clearly distinguishable. In Rose, defense counsel was totally unfamiliar with the concepts of aggravators and mitigators and conducted virtually no investigation or preparation for the penalty phase, relying instead on a lingering-doubt defense; in the postconviction proceedings, Rose adduced significant evidence concerning his head injuries, diagnosis as "schizoid," and his abused and neglected childhood. In Hildwin, the circuit court found counsel's performance deficient, but misapplied the prejudice standard in denying relief; defense counsel failed to discover Hildwin's prior psychological hospitalizations, as well as the fact that he had an abused childhood and performed well in prison. In Phillips, defense counsel failed to sufficiently investigate mental mitigation and

failed to uncover significant evidence concerning Phillips' schizoid personality and borderline IQ. In Bassett, counsel was deemed ineffective for failing to investigate evidence concerning his domination by his codefendant.

In this case, by contrast, sufficient investigation was performed into Asay's life history and mental background, and it is clear that further investigation, or presentation of evidence derived therefrom, would not have been helpful. The mental health expert retained by original counsel painted a highly negative portrait of Asay--no major mental illness or disease, no test results indicating any significant abnormality, a deceptive and manipulative nature, a hatred of blacks, an escalating history of violence, and an anti-social personality disorder. The collateral experts purported to find mental mitigation, but their attempts to tailor their theories to the facts of the case (about which they were virtually ignorant) were far-fetched in the extreme, *i.e.*, describing Asay as a "non-intellectual racist" or attributing his actions to the result of twenty-year-old neurotoxins caused by childhood bee-stings, and each expert would have been forced to acknowledge Asay's poor prison record and history of violence.

While some attorneys might have presented evidence of Asay's abusive childhood, not all would have felt compelled to do so, and

many would have sided with David's view that such presentation carried a good deal of risk. Again, Asay's life history is not one with a hidden good side. His prior record was not good and his own siblings would have testified to violent acts he committed. Counsel's decision to present little character evidence was reasonable and resulted in securing at least some votes for life imprisonment. Judge Haddock, the original sentencing judge in this case, correctly concluded that the unpresented mitigating evidence would not have created a reasonable probability of a different result. The crimes in this case are not "garden variety murders," assuming that such actually exists, and this was no "robbery gone bad". Indeed, these murders are some of the most repugnant in Florida's capital history, and a life sentence would not have been a reasonable result in this case. The circuit court's denial of relief on this claim should be affirmed in all respects.

POINT IV

DENIAL OF ASAY'S CLAIM OF INEFFECTIVE ASSISTANCE AT THE GUILT PHASE WAS NOT ERROR.

Asay next claims that David rendered ineffective assistance at the guilt phase in four respects: (1) failing to move to disqualify Judge Haddock; (2) failing to pursue a reasonable doubt strategy; (3) failing to utilize a defense of voluntary intoxication; and (4)

failing to rebut the State's theory of racial motivation for the crimes. Items (2) through (4) were raised in Claims IV and XVI and were the subject of the evidentiary hearing. The first item, recusal, was not raised in these claims and, instead, was an alternative allegation in Claim II that the judge deemed an improper attempt to circumvent the procedural bar (PCR (S)I 66). Kight v. Dugger, 574 So.2d 1066, 1073 (Fla. 1990); Medina v. State, 573 So.2d 293, 295 (Fla. 1990). Accordingly, item (1) will not be further discussed. See also Claim I, supra; Claim V, infra. Judge Haddock correctly found that deficient performance and prejudice were not demonstrated under Strickland v. Washington as to the other matters (PCR II 263-9, 273-4), and his denial of relief on this claim should be affirmed in all respects.

A. Relevant Facts Of Record

Asay was arrested for these crimes on August 1, 1987, and the Office of the Public Defender was appointed to represent him (OR I 5). Attorney Buzzell requested discovery and secured the appointment of a mental health expert before withdrawing in January 1988 (OR XV 30, 41). Ray David was appointed to represent Asay the next month and secured the appointment of an investigator shortly thereafter (OR I 43). Both parties requested and received continuances, and the trial began on September 26, 1988. David's

opening statement claimed that, due to lack of evidence or conflict in evidence, the jury would have no difficulty finding Asay not guilty (OR IV 1-8).

The State called fourteen witnesses, including Asay's brother, Robbie Asay, and his close friend Bubba O'Quinn. Both testified that, on July 17, 1987, they went to several bars with Asay, beginning at 7:00 p.m., shooting pool and drinking beer at The Dog House and another bar, and that they left around 2:00 a.m. Both testified that, despite drinking beer, none of them, including Asay, was intoxicated or drunk (OR 493, 495, 556). They drove downtown looking for prostitutes. Robbie drove his own truck, and O'Quinn drove Asay's, with Appellant as a passenger.

Robbie pulled over at the corner of Sixth and Laura and began talking to a black male about "picking up some hookers." O'Quinn stopped a short distance away at Asay's direction (OR 498). Asay ran over to his brother and the first victim, Robert Booker, and told Robbie, "You know, you ain't got to take no shit from these fucking niggers" (OR 559). Robbie assured Asay that "everything is cool," but, after a few minutes passed, Asay reached into his back pocket, pulled out a gun, and shot Booker once, saying: "Fuck you, nigger." (OR 498-9, 559-560). Booker ran off and eventually died under a house. Frightened, Robbie drove off (OR 560-2). Asay

jumped into the back of his truck, and O'Quinn drove some distance before stopping and letting him back into the truck. When O'Quinn asked why he shot the victim, Asay answered: "Because you got to show a nigger who is boss." (OR 501). According to O'Quinn, Asay's demeanor did not change at all: "I guess it really didn't affect him." O'Quinn asked Asay if he was alright, and Asay stated: "I'm cool." (OR 501-2).

The two continued their pursuit of prostitutes and came upon a transvestite called "Renee," whose real name was Robert McDowell (Asay's second victim) (OR 503-4). O'Quinn negotiated a price for oral sex with McDowell and asked him to get into the truck, but the victim declined. O'Quinn drove to a more secluded area, and Asay got out and walked away. As the victim stood outside the truck talking to O'Quinn, however, Asay returned, grabbed McDowell by the arm, and shot six times as McDowell screamed and tried to escape (OR 509-510). Asay re-entered the truck and told O'Quinn to "crank it up," and they drove back to the Asay house. On the way, O'Quinn asked Asay why he shot the second victim, and Asay responded: "The bitch had beaten me out of ten dollars." (OR 512). On reaching the house, O'Quinn told Robbie of the second murder, and Asay asked O'Quinn to help change the appearance of his truck, which O'Quinn declined to do (OR 511-13).

The State also called two cousins, Charlie C. Moore (a/k/a "Danny") and Charles L. Moore (a/k/a "Charlie") who testified to admissions Asay made to them after the crimes. Charlie testified that Asay woke him in the middle of the night, needing to build a bumper for his truck. Asay said it was a "life and death situation" and that he had been "involved in a shooting downtown" (OR 682-3). A few days later, Asay met with the Moores, and they set out to find a bumper for Asay's truck. During that drive, Asay pointed out where he shot McDowell (OR 688). Asay said that he and O'Quinn were looking for prostitutes when they saw the "boy" who cheated Asay during a drug deal. Asay said he told McDowell that if he ever "got" him, "he would get even" (OR 688-9). Asay stated that he told O'Quinn to get McDowell into the truck so that they could "take her out and screw her and kill her," but that O'Quinn was unable to persuade the victim to get into the truck (OR 649, 687). According to Danny, Asay kissed McDowell or put a "liplock" on him, realized his true gender, and began shooting as the victim cried, "Please don't hurt me" (OR 651, 689). Asay said that he shot McDowell in the chest, firing four shots or so, and finished him off with two additional shots after he fell to the ground (OR 651, 689). When Charlie Moore asked if it bothered him to shoot

someone, Asay replied it did not, because the victim had been “a faggot” (OR 687).

The State also called Thomas Gross, who was incarcerated with Asay in August 1987 in the Duval County Jail. Gross stated that Asay showed him some newspaper clippings and said, “I shot them niggers,” and further displayed racist tattoos, including a Swastika and the words “White Pride” and “SWP,” the latter standing for “Supreme White Power” (OR 751-3, 759). Asay said he was in jail because his brother “pussied” him out (OR 760). The State also called the medical examiner, who testified that Robert Booker died from a single gunshot to the abdomen, described as a “very fatal shot,” that perforated his intestines and led to hemorrhaging (OR 424). McDowell had six gunshot wounds, including wounds to the chest, back, hand, and forearm. The last two shots were from close range, given the presence of gunpowder residue or stippling (OR 431-5). Dr. Floro testified that McDowell could have been shot while lying on the ground, with the shooter standing over him (OR 437). Bruises to the victim’s face were consistent with falling to the ground after being shot (OR 438-9). The State also showed that the appearance of Asay’s truck changed after the shooting, with Asay adding a bumper, lights on the top, and tinting to the windows

and removing a sticker from the back window and the tool box (OR 514, 566).

David cross-examined the State's primary witnesses closely, focusing on inconsistencies between their trial testimony and prior statements or depositions (OR 439-457) [**Dr. Floro--**elicited testimony as to drug or alcohol level of victim's blood and suggesting alternative angle of shots as to victims]; (OR 514-536) [**O'Quinn--**elicited inconsistency with prior statement in deposition and testimony that O'Quinn was never charged with the offenses]; (OR 567-595) [**Robbie Asay--**elicited testimony that he was not charged with any of the offenses, that he was slapped and hit during his police interview, that Asay seemed "shaken up" after the first shooting, that Booker was allegedly not the man he talked to that night, and that he never saw Asay with a gun]; (OR 654-671) [**Danny Moore**--impeached with inconsistencies in his deposition and sworn statement and elicited testimony that he did not know the date he talked with Asay, that he had a prior record, that McDowell may not have been black but rather Filipino, and that he may have expected a reward from Crime Watch]; (OR 689-715) [**Charlie Moore--**impeached with prior testimony from deposition or sworn statement and elicited testimony that he did not know date of telephone call from Asay, that McDowell was "known as a white person," that he had

been concerned about being charged as an accessory in this case, that he might have expected a reward from Crime Watch, that he never put a bumper on Asay's truck, and that he never saw Asay show disrespect to black people]; (OR 763-772) [**Gross**--impeached with prior statement and prior refusal to give deposition and elicited testimony about any expected benefits in exchange for testimony and that he was threatened with perjury, that he himself had racist tattoos, and that he was presently serving a twenty-five-year sentence with several minimum mandatories]. The defense called no witnesses and, accordingly, had opening and closing statement at the guilt phase. In these closing arguments, David attacked the State's showing of premeditation and pointed to conflicts in the evidence as a basis for acquittal or conviction of a lesser offense. (OR 815-849, 904-925)

At the 1996 evidentiary hearing, David testified that he had been in practice since 1979 and had handled at least two hundred jury trials (PCR XVIII 633). David confirmed that he entered the case after Buzzell withdrew and that he obtained the services of investigator Moncrief (PCR XVIII 634). David stated that Moncrief interviewed Asay, who admitted committing these crimes but scoffed that he would never receive the death penalty because he "had only killed a nigger and a faggot." (PCR XVIII 642). He stated that

Asay's admission presented him with an ethical dilemma that was a factor in deciding not to call any witnesses (PCR XVIII 643). He also testified that he did not want Asay on the stand at the guilt phase, given his prior criminal record and incarcerations (PCR XVII 514). David testified that he felt that the State had a strong case, especially given that one of Asay's own brothers would be a prosecution witness (PCR XVIII 676). He testified that, in his experience, he had never seen an intoxication defense work, and that, accordingly, he reserved any expert testimony in that regard for the penalty phase, when he called Dr. Miller (PCR XVIII 657). David also testified that Dr. Vallely's report indicated that Asay's account of an alcoholic blackout was completely unbelievable and inconsistent with the facts and his statements to the doctor (PCR XVIII 647).

When apprised of the substance of the testimony of Stephens, Collins, and Hunter, see Point III, supra, David testified that he would not have called any of them because they carried too much negative "baggage" (PCR XVII 534; XVIII 663-4, 687-91). David noted that two of the them were racist members of the Aryan Brotherhood and that their description of Asay as a "choir boy" would hardly be convincing to the jury. He also noted that with the testimony of Collins, the former assistant warden and

psychologist, “the bad outweighs the good,” because it would have brought out less favorable aspects of Asay’s behavior in prison (PCR XVIII 663-4, 687-93). David also testified that he wanted to maintain the “sandwich” closing argument, *i.e.*, both opening and closing, and that he was not inclined to forfeit that simply to call a witness of “marginal” value (PCR XVIII 663-4, 671-2). David noted that Asay’s being assaulted by whites in prison did not make it likely that his tattoos were for “protection” (PCR XVII 534-6). David was questioned extensively on his cross-examination of O’Quinn, Robbie Asay, and the Moores and was asked why he did not pursue certain lines of inquiry (PCR XVIII 562-70, 593-624). David testified that he reviewed the depositions and sworn statements of the witnesses prior to trial, and that, in cross-examination, he tried to focus on the most important points or inconsistencies, noting that he wanted to demonstrate that neither O’Quinn nor Robbie was charged with anything regarding these murders (PCR XVIII 561, 664-5, 667). David testified that if a lawyer impeached a witness on every conceivable inconsistency, “I think it makes an issue of your credibility,” and that he felt that at some point “enough was enough” and continuing would “belabor” the point and alienate the jury (PCR XVII 568-9; XVIII 695-6). Collateral counsel did not call any of the witnesses at issue--O’Quinn, the

Moores, or Robbie Asay (as to this matter)--to show what the result of any additional cross-examination might have been.

In denying relief, Judge Haddock gave great weight to David's testimony, finding that neither deficient performance nor prejudice had been demonstrated under Strickland v. Washington (PCR II 263-9, 273-4). On that portion of the claim relating to the intoxication defense, raised as Claim XVI, the court held:

> Despite the allegation in the motion that easily accessible evidence was available to show that Mr. Asay arrived at the Doghouse bar completely intoxicated, and that he arrived at the second bar so drunk that he could not drive, no such evidence was presented during the evidentiary hearing. Even Robbie Asay, in his testimony at the evidentiary hearing, offered no opinion as to his brother's lack of sobriety on the evening of the murders. Mr. David was aware, as he testified, that the defendant had told Dr. Vallely he had drunk only beer on the night of the murders and had consumed no drugs; he also knew that the doctor's report indicated that the defendant's recollection of events before and after the murder was inconsistent with alcoholic blackout. Therefore, Mr. David was acting as a reasonably competent attorney would, in deciding that voluntary intoxication, as a trial defense, should be ruled out. He also testified at the evidentiary hearing that he had 'been doing this for a long time' and that he 'had never seen it (voluntary intoxication) work.' Collateral counsel failed to meet their burden of proof that every reasonably competent attorney would have utilized voluntary intoxication as a defense at the trial. Mr. David's competency is demonstrated by the fact that, while he reasonably

> eliminated voluntary intoxication as a defense in the guilt phase, he did use Dr. Ernest Miller's testimony regarding intoxication in response to hypothetical questions during the penalty phase. This Claim is without merit.

(PCR II 273-4).

As to the remaining components of the claim, Judge Haddock found:

> Claim IV also criticizes the trial defense counsel for failing to 'challenge' the State's case by effectively cross-examining four State witnesses. At the evidentiary hearing, these witnesses were not called by the defense, so no showing was made as to what different information might have been elicited nor what different results might have come from a different, or more lengthy cross-examination. While these witnesses' statements did contain some minor inconsistencies, the Court finds that there was no showing or any damage which could have been done to the State's case by pursuing them in some different manner. Mr. David adequately and vigorously cross-examined State's witnesses O'Quinn, Floro, Danny Moore, and Charlie Moore. Mr. David also vigorously attacked the credibility of these witnesses and conflicts in the evidence during his closing argument. Mr. David's testimony effectively refutes the contention in this Claim that it would have been better strategy or tactics to pursue these minor inconsistencies any further than was done during the trial.
>
> The motion seeks to show that Mr. David was ineffective because he was unable to prevent the issue of race or racial hostility from being an issue at the trial. Collateral Counsel failed to make any showing whatsoever that any attorney, no matter how skilled,

would have had any way of keeping the issue of race or racial hostility from being brought out in this trial. The defendant made statements to witnesses which were extremely probative and relevant to the issue of premeditation. Part and parcel of this evidence were statements dealing with racial motivation for these killings. The State was entitled to have them admitted, and their admission was affirmed on direct appeal. Collateral counsel failed to show any method that could have been used to prevent these statements from being admitted, so the burden of proof is not met on this issue.

With regard to the issue of calling witnesses to testify that Mr. Asay was not a racist and co-existed peacefully with black inmates in prison, Mr. David testified that as part of his trial strategy he wished to preserve the defense's option of having two closing arguments at the guilt phase. His decision not to call witnesses of marginal value at the price of losing this advantage was a valid trial tactic. Mr. Davis is an extremely experienced and talented criminal defense lawyer, who was and is well able to weigh the value of such potential testimony against the high price of losing the second closing. Mr. David testified that, even during the evidentiary hearing, when he was apprised by both sides of potential testimony by witnesses Stephens and Hunter, he would still choose <u>not</u> to call these witnesses in light of the tactical disadvantage. Mr. David also testified, and this Court agrees, that former inmates Hunter and Stephens, convicted felons and admitted racists themselves in their own right, were lacking in credibility, and would have benefited the defendant's case very little, at great cost. Likewise Mr. David opined, and this Court agrees, that the testimony of Joe Collins, the former warden and psychologist at the Texas prison, was of

minor if any value to the defense, while having the same negative result of forfeiting the second closing argument. Mr. David testified to the secondary negative aspect of Mr. Collins' testimony, in that on cross-examination he would have been required to reveal negative aspects of Mr. Asay's behavior while incarcerated in his institution, and this further weighed on the side of not calling this witness. The evidence on this issue fails to demonstrate any deficient performance or prejudice.

The witness Johnny Sharp provided one of the most bizarre and amusing, albeit useless, moments of courtroom experience that the undersigned has ever observed. Interestingly, Collateral Counsel never questioned Mr. David about calling Mr. Sharp as a witness, or about what testimony he could have or should have elicited from Mr. Sharp at the trial, but this Court finds that a reasonably qualified attorney would have concluded that the chances of Mr. Sharp being allowed to give this testimony during the guilt phase were highly unlikely, indeed next to impossible. Most certainly if this testimony had been heard by the trial jury during the guilt phase it would have the overall effect of being extremely harmful to the defendant's case. The fact that the State argued that the defendant's motivation was in part racial would not make evidence of a promiscuous and perverted sexual relationship in 1986, over one year prior to these murders, with a black fellow inmate at Tomoka Correctional Institute, admissible in the guilt phase. Evidence of racial motivation does not make individual acts of alleged 'non-bias' admissible. Further, Sharp's testimony that Asay loved him and did not feel threatened by other black inmates at Tomoka would absolutely conflict with the defense view that Asay had racist tattoos put on only in order to prevent harassment by

> black inmates. Sharp's testimony might have allowed the State to argue very effectively in closing that guilt or shame over his resorting to homosexual relationships in prison may have motivated him to hate blacks as a symbol and reminder of his past degradations. Not only was it not shown that every reasonably competent attorney would have called these witnesses, this Court finds that no reasonably competent attorney would have called Mr. Sharp as a witness.

(PCR II 264-6).

*B. Deficient Performance and Prejudice Have not Been Demonstrated Under **Strickland v. Washington***

Asay claims that David was ineffective at the guilt phase for failing to: adequately cross-examine witnesses or pursue a reasonable doubt defense; pursue a voluntary-intoxication defense; and counter evidence of racial motivation on Asay's part.[8]

Despite being afforded an evidentiary hearing, Asay failed to prove that David did not adequately cross-examine witnesses or advocate reasonable doubt sufficiently. The most that can be said is that collateral counsel think additional questions should have

[8] Collateral counsel also seem to suggest that David improperly conceded Asay's guilt during closing argument (Initial Brief at 88). When shown a transcript of his argument, he stated that a typographical error had been made, as the rest of the argument clearly showed that he was urging acquittal on Asay's behalf (PCR 668-9). Judge Haddock specifically credited this testimony in denying relief (PCR II 266-7). No basis for reversal has been demonstrated.

been asked of the witnesses, which, by itself, proves nothing. Cf. Aldrich v. Wainwright, 777 F.2d 630, 636-7 (11th Cir. 1985). David, when examined eight years after the trial about his philosophy on cross-examination or impeachment, testified that he read the depositions and sworn statements of the witnesses and focused on what he perceived to be the most important inconsistencies or bases for impeachment (PCR XVII 561; XVIII 664-7). He stated that focusing on minutia or belaboring a minor inconsistency was not fruitful, adding that, if one "played games" with seeming inconsistencies, "you get burned or you get bit by them" (PCR XVIII 665-7). Collateral counsel have yet to identify any specific impeachment not done by David that would have created the probability of a different result, and Asay's reliance on Smith v. Wainwright, 799 F.2d 442 (11th Cir. 1986), in which counsel failed to impeach a codefendant with his statement acknowledging sole responsibility for the crimes at issue, is clearly misplaced.

Collateral counsel's suggestion that Judge Haddock precluded development of an adequate record on this claim (Initial Brief at 86-8) is not well taken. A trial court enjoys wide latitude in conducting evidentiary hearings, and its discretion includes curtailing cumulative questioning. Medina v. State, supra; Robinson v. State, supra. Judge Haddock allowed collateral counsel

to question David fully on his examination of each primary witness (PCR XVII 562-70, 593-624) and, as in Robinson, entertained written proffers of matters not covered in the courtroom (PCR(S) I, Defense Exhibits G & H). David pursued a defense of "reasonable doubt" more than adequately, using closing argument to focus on, *inter alia*, inconsistent versions of events given by the witnesses (OR 839-41), and no basis for relief has been demonstrated.

Collateral counsel rather paradoxically begin their argument on voluntary intoxication by stating that, because David suggested during trial that O'Quinn could have shot Booker, Asay's confession to him did not prevent him from presenting defense evidence (Initial Brief at 89-90). This contention, of course, has nothing to do with whether any valid basis existed for a defense of voluntary intoxication (and, as demonstrated below, none did), but, in any event, is not well taken. David's suggestion during trial that the evidence did not exclude O'Quinn as a possible shooter (OR 843-4, 846, 848), was based on evidence the State had introduced, and did not require him to introduce evidence he knew to be false. Scott v. Dugger, 891 F.2d 800, 803 (11th Cir. 1989) (counsel cannot be deemed ineffective for failing to present a defense he knows to be false); Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997) (same). In any event, no basis in fact existed for a defense

of voluntary intoxication. Although collateral counsel boldly assert, "Numerous witnesses testified that Mark was under the influence of alcohol the night of the murders" (Initial Brief at 89-90), no record citation supports this claim. Judge Haddock's order includes the following finding: "Despite the allegation in the motion that easily accessible evidence was available to show that Mr. Asay arrived at the Dog House bar completely intoxicated, and that he arrived at the second bar so drunk that he could not drive, no such evidence was presented during the evidentiary hearing." (PCR II 273).

The most that can be said is that O'Quinn and Robbie Asay testified that they and Asay drank beer the night of the murders. However, both expressly testified that none of them, including Asay, was intoxicated (OR 493, 495, 556). This testimony was unrefuted, and Dr. Vallely's report and observations of Asay was entirely inconsistent with any defense of voluntary intoxication or alcoholic blackout (see State's Exhibit #1). Accordingly, neither deficient performance nor prejudice was demonstrated. Kokal v. Dugger, 718 So.2d 138, 141, n12 (Fla. 1998) (counsel not ineffective for not presenting an intoxication defense where defendant clearly recalled events surrounding murder and mental health expert had no corroboration for that defense; no "substance"

to claim of ineffectiveness); Rivera v. State, 717 So.2d 477, 485 (Fla. 1998) (counsel not ineffective for not asserting intoxication defense where defendant insisted on his innocence and no evidence defendant was intoxicated at time of murder); Remeta v. Dugger, 622 So.2d 452, 455 (Fla. 1993) (valid trial decision not to pursue intoxication due to lack of basis therefor); Koon v. Dugger, 619 So.2d 246, 249 (Fla. 1993) (counsel not ineffective for not presenting intoxication defense where, *inter alia*, counsel knew it not successful, given his experience, and it was inconsistent with defendant's version of events). As in Koon, David testified that intoxication had had no success in his experience. Asay's actions at the time of the murders, as well as his later statements, were totally inconsistent with an intoxication defense. No basis for relief has been demonstrated.

Asay also complains about David's failure to rebut the theory that these murders were racially motivated. To the extent that this claim relates to not calling such witnesses as Douglas Stephens, David Hunter, Joe Collins, and Johnny Sharp, no basis for relief has been demonstrated. David, when apprised of the nature of their testimony, testified that he would not have used any of them because they would have done more harm that good. Judge Haddock properly credited this testimony in denying relief (PCR II

264-5). Stephens and Hunter were avowed racists and members of the Aryan Brotherhood, and Stephens put the racist tattoos on Asay (Stephens Deposition at 10). Collateral counsel have yet to explain why any reasonably competent attorney would have felt compelled to call such scum of the earth as "character" witnesses, especially when they also would have testified that Asay used the term "nigger" and that his huffing solvents in prison made him more aggressive toward blacks (Stephens Deposition at 9, 19-20; PCR II 298-300). While Collins was not a prisoner, he would have testified that Asay was a sociopath with an anti-social personality disorder and was totally unaware of the circumstances of these murders. He knew, however, about Asay's prison records, which were not helpful (PCR II 345, 349, 358-9).

Further investigation of Asay's behavior in prison, whether in Florida or Texas, would not have been beneficial, given his sixteen disciplinary reports (including one for choking an inmate), his description as a management problem and demonstrated security risk, and his having been victimized by white, rather than black, inmates (Defense Exhibit #4, Tabs 8 & 9; State's Exhibit #1). Although David was unaware of the contents of Sharp's new testimony, Judge Haddock correctly determined that it would not have been favorable to the defense. It is questionable that such testimony could have

been introduced and it was in all respects incredible. It is difficult to see how the fact that Asay fraternized or "felt at ease" with black inmates would assist his theory that his racist tattoos were obtained only for protection (PCR II 266). It is well established that counsel cannot be ineffective for not presenting evidence that would "open the door" to harmful matters, Rutherford, 727 So.2d at 220, Robinson, 707 So.2d at 696-7, and counsel's decision not to forfeit two closing arguments by calling marginal witnesses was reasonable. Van Poyck v. State, 694 So.2d 686, 697 (Fla. 1997). Given the overwhelming evidence against Asay, including eyewitness testimony to both murders and the recounting of his inculpatory statements, it is clear that any deficiency of counsel did not prejudice Asay to the extent that the results of the trial are unreliable. Accordingly, the denial of relief on this claim should be affirmed in all respects.

Collateral counsel also state: "The racial motive advanced by the prosecution developed mainly through an alleged jailhouse confession to Thomas Gross." (Initial Brief at 91). This assertion is squarely contradicted by the record. Gross testified that Asay confessed to him (OR 751), but this admission was superfluous to the State's case, given eyewitness testimony and the testimony about Asay's more detailed admissions. While Gross

testified about Asay's racist tattoos (OR 752, 758-760), Asay's racial motive for the murders had unquestionably, and indelibly, already been established by testimony about his statements at the time of the murders themselves, i.e., Asay told Robbie, "You know, you ain't got to take no shit from these fucking niggers" (OR 559); when he shot Booker, he exclaimed, "Fuck you, nigger" (OR 499); he told O'Quinn he shot Booker "Because you got to show a nigger who is boss," and "You can't let them run all over you" (OR 501, 531). Nothing David did not do, and nothing the prosecutor allegedly did, regarding Thomas Gross (Initial Brief at 91-2) could have affected the admissibility of the above evidence, and, at the hearing, Asay offered no rebuttal or explanation for his remarks at the time of the murders.

To the extent that any valid claim under Strickland v. Washington, Brady v. Maryland, and/or Giglio v. United States was either pled or proffered below, or is properly presented to this Court (it is the State's most emphatic position that such is not the case, see Claim II, supra), no reasonable view of the record could sustain the granting of relief. Thomas Gross was not such a critical witness that any act or omission regarding him affects the reliability of Asay's convictions and death sentences. The prosecutor mentioned Gross's testimony sparingly during closing

argument at the guilt phase (OR 851-2, 854, 856, 880-1, 893) and never mentioned it at the penalty phase (OR 1034-1052). David extensively cross-examined Gross and elicited testimony that, in exchange for his testimony, three letters were to be written on his behalf by the State Attorney's Office; that he had not been charged with perjury, even though threatened with it; that he was serving a 25 year sentence; that he refused to attend a deposition in this case; and that he did not want to be labeled a "snitch" (OR 763-772). David emphasized these matters in closing argument as reasons why the jury should disbelieve Gross (OR 836-9, 848, 917-18):

> The defendant's own statements told Mr. Gross he was bragging. I take -- I submit to you, you can take everything Mr. Gross said and pitch it right out the door. A guy's got eight felony convictions, miner (sic) things, armed robbery, stuff like that. He's scared here. He's worrying about perjury. Perjury is not telling the truth under oath. Well, he gave a sworn statement. What he did the next time was not testify. That's not perjury. That may be contempt of court, but it sure ain't perjury. If you don't say anything, how can you perjure yourself?
>
> A year later he's so concerned that they were going to come and put this perjury charge on him, after he does his 25 years, and after he goes to God knows where to do his parole, he's just coming in here because he's a good guy, and all he's getting is three letters.

> Wait until there is no blacks left, that's what Gross said. Gross went to the State Attorney's Office, "I want to make a deal, I want to get a better sentence." Why in the world wouldn't you make something up? If he is going to get a better sentence, what does he have to lose? Nobody in prison does something for nothing. Nobody. Nobody, especially if it's life threatening.

(OR 917-18).

Given, *inter alia*, Gross's relative lack of significance in this case, his impeachment at trial, and David's arguing to the jury his motive for testifying, Asay is entitled to no relief under any theory regarding Gross. Robinson, 707 So.2d at 693-4 (not entitled to postconviction relief in regard to alternative Strickland/Brady/Giglio claim where claim legally insufficient under any theory; while counsel did not impeach codefendant with prior inconsistent statement allegedly not disclosed, jury had ample information to assess witness's credibility and weigh his testimony); Haliburton, 691 So.2d at 469-70 (not entitled to relief on alternative Strickland/Brady claim in regard to allegedly undisclosed deal with state witness, where, *inter alia*, witness substantially impeached); Mills v. State, 684 So.2d 801, 805-6 (Fla. 1996) (summary denial of Brady claim involving impeachment of critical state witness proper where, *inter alia*, witness's credibility attacked on different grounds at trial and where

evidence, even if true, would not change conclusion that defendant committed the murder and that death was appropriate sentence); Routly v. State, 590 So.2d 397, 399-401 (Fla. 1991) (not entitled to Brady/Giglio relief where, despite alleged state withholding of evidence, factors that motivated testimony of former codefendant adequately presented to jury); Roberts v. State, 568 So.2d 1255, 1259-60 (Fla. 1990) (summary denial of alternative and mutually exclusive Strickland/Brady claims not error where no reasonable probability of different result demonstrated, even if allegations true).

POINT V

THE COURT PROPERLY DENIED RELIEF ON THE OTHER CLAIMS.

As his final claim, Asay summarily contends that Judge Haddock erred in denying relief on the remaining claims in his motion- Claims I through III, V through XII, XIV, XV, and XVII through XX. Because Asay does little more than list the claims, often without identifying them, these matters have been insufficiently briefed and, thus, are waived. Duest v. Dugger, 555 So.2d 849, 851-2 (Fla. 1990); Roberts, 568 So.2d at 1260.

Asay has failed to demonstrate any basis for reversal. His initial contention that the court was required to physically attach

portions of the record to the order (Initial Brief at 96) is meritless. Judge Haddock set forth in his order of March 21, 1996, a clear rationale disposing of each claim (PCR(S) I 65-7). Diaz v. Dugger, 23 Fla.L.Weekly S332 (Fla. June 11, 1998); Mills, 684 So.2d at 804; Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993). Judge Haddock relied on this Court's precedent when he found the vast majority of Asay's claims procedurally barred, and Asay offers absolutely no basis for reversal. Ragsdale v. State, 720 So.2d 203, 204, n1 (Fla. 1998) (**Claim II**--claim that trial court should have recused itself procedurally barred on 3.850); Valle v. State, 705 So.2d 1331, 1335 (Fla. 1997) (**Claim V**--claim of vague CCP jury instruction procedurally barred on collateral attack in absence of specific trial objection and presentation on appeal, both lacking *sub judice*); Pope v. State, 702 So.2d 221, 225 (Fla. 1997) (same); Jackson v. State, 648 So.2d 85 (Fla. 1984) (same);[9] LeCroy v. Dugger, 727 So.2d 236, 237-8, 241, n3, n11 (Fla. 1998) (**Claim VI**--claim of no limiting instructions on aggravating circumstances procedurally barred on 3.850); Robinson v. State, 707 So.2d 688,

[9] Asay persists in failing to acknowledge that in his case the court did not give the standard jury instruction condemned in Jackson, but rather one propounded by defense counsel that included definitions of the terms (OR 1067). In any event, the jury was only instructed on this aggravator for the McDowell murder, but recommended death for both murders by the same margin, clearly evidencing a lack of prejudice (OR 1067, 1075).

690, n.1, 2 (Fla. 1998) (**Claim VI**--claim that jury weighed invalid and vague aggravators procedurally barred on 3.850); Valle (**Claim VII--**claim that capital sentencing statute unconstitutionally vague and overbroad procedurally barred on 3.850); Cherry, 659 So.2d at 1071-2; (**Claim VIII--**claim of improper prosecutorial argument at penalty phase procedurally barred on 3.850); Diaz (**Claim IX**--claim that sentencer failed to find mitigation procedurally barred on 3.850); Teffeteller v. Dugger, 24 Fla.L.Weekly S110, 111-12 (Fla. March 4, 1999) (**Claim X**--"burden-shifting" claim procedurally barred on 3.850); Rivera, 717 So.2d at 480, n2 (**Claim XI--** prosecutorial argument and conduct; improper to re-raise previously rejected appellate issue on 3.850); Rivera (**Claim XIV--**denial of continuance; improper to re-raise previously-rejected appellate issue on 3.850); Harvey v. Dugger, 656 So.2d 1253, 1255-6 (Fla. 1994) (**Claim XV--**preclusion of mitigation due to denial of continuance; improper to relitigate previously rejected appellate contention under new legal theory on 3.850); Van Poyck, 694 So.2d at 698-9, n8 (**Claim XVII**--preclusion of mercy or sympathy procedurally barred on 3.850); Rivera (**Claim XVIII--**alleged violation of Caldwell v. Mississippi, 472 U.S. 320 (1985); improper to relitigate previously rejected appellate issue on 3.850); Rivera, 717 So.2d at 480, n1, 2 (**Claim XX--**claim of cumulative

error procedurally barred on 3.850). Counsel's summary alternative allegations of ineffective assistance in some of these claims (Initial Brief at 96-8) does not save them from procedural default, as Judge Haddock correctly held, in light of this Court's many precedents to that effect. Rutherford, 727 So.2d at 219, n2 (approving summary denial of procedurally barred claim "even if couched in ineffective assistance language"); Rivera, 717 So.2d at 480, n2 (condemning improper attempt to circumvent procedural bar rule by "conclusory allegations of ineffective assistance"); Cherry, 659 So.2d at 1072 ("allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal"); Lopez v. State, 634 So.2d 1054, 1056-7 (Fla. 1993) (same); Kight v. Dugger, 574 So.2d 1066, 1073 (Fla. 1990) (same); Medina, 573 So.2d at 295 (same). All of the above rulings are correct and should be affirmed.

In addition to procedural bar, Judge Haddock summarily denied Claims I, III, XII, and XIX on other grounds. The denial of Claim III, recusal, was addressed in Point I, infra. As to Claim I, public records, the court found in its order of March 16, 1996, that the matter was moot because, following much litigation, no issue of public records disclosure remained to be litigated (PCR(S)

I 65-6). This ruling is entirely consistent with the position advocated by collateral counsel at the Huff hearing when he expressly stated that Claim I "doesn't require any further action by this Court." (PCR XVI 369-370). This case is comparable to Mendyk v. State, 707 So.2d 320, 322 (Fla. 1997); Haliburton; Mills; and Bush v. State, 682 So.2d 85, 88 (Fla. 1996). Any public records claims arising after the court's ruling are discussed in Point II, infra. As to Claim XII, alleged deficiencies in the original mental health examination, Judge Haddock found the claim was insufficient, conclusory, and failed to state a basis for relief (PCR(S) I 69-70). This finding was correct, and, in any event, this matter largely overlaps the claim of penalty-phase ineffectiveness for which an evidentiary hearing was granted. As demonstrated in Points III and IV, Dr. Vallely possessed all of the relevant information needed to make a reliable diagnosis. See also Jackson v. Dugger, 547 So.2d 1197, 1200-1 (Fla. 1989). Finally, as to Claim XIX, prosecutorial misconduct, Judge Haddock ruled that it was conclusory, facially insufficient, and procedurally barred (PCR(S) I 71). For the reasons set forth in Points II and IV, that ruling was correct. No basis for relief has been demonstrated, and the court's rulings should be affirmed in all respects.

CONCLUSION

WHEREFORE, for the foregoing reasons the State of Florida asks this Court to affirm the Circuit Court’s denial of relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Heidi E. Brewer, Assistant CCC, Office of Capital Collateral Regional Counsel, Northern Region, P.O. Drawer 5498, Tallahassee, Florida 32314-5498, this _____ day of July, 1999.

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RICHARD B. MARTELL