IN THE SUPREME COURT OF FLORIDA

JUDY A. BUENOANO,

Appellant,

vs. CASE NO. 92,522

STATE OF FLORIDA, ACTIVE DEATH WARRANT

Appellee.

_____/

APPEAL FROM DENIAL OF THIRD RULE 3.850 MOTION TO VACATE
THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
ORANGE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

This is an appeal from the denial of Buenoano's third Rule 3.850 motion to vacate. Designations to the original trial record will be identified by the letters "TR" followed by the appropriate page. Designations to the instant postconviction record will be referred to by the letter "R" followed by the appropriate page.

INTRODUCTION

After Judy Buenoano's unsuccessful attempt to kill her fiance, John Gentry, with a car bomb in 1983, law enforcement officers began to investigate Buenoano's involvement in the deaths of her husband, Sgt. James Goodyear, her 19-year old invalid son, Michael Goodyear, and her common-law husband, Bobby Joe Morris.

In 1971, Buenoano's husband, James Goodyear, died of arsenic poisoning. In 1978, her common-law husband, Bobby Joe Morris, also died of arsenic poisoning. In 1980, her 19-year old son, Michael, partially paralyzed as the result of profound heavy metal neuropathy and weighted down with leg braces and a Robins' Hook, drowned only one day after he was discharged from the hospital to his mother's care. Buenoano was the beneficiary under a number of life insurance policies issued on the lives of all three victims and she was entitled to other monetary benefits upon the victims' deaths. Had John Gentry not survived the car bombing in 1983, Buenoano stood to collect $500,000 in insurance proceeds and one-half of his estate.

Now, more than a decade after her convictions became final, Buenoano seeks to set aside her conviction and death sentence for the premeditated murder of her husband, Sgt. James Goodyear, on the ground that Roger Martz' lab results -- *i.e., that the vitamin capsules given to one of the collateral crime victims were found to contain paraformaldehyde* -- introduced via stipulation at trial in 1985, are purportedly subject to impeachment by a former FBI lab employee, Frederic Whitehurst, who did not begin working at the FBI lab until 1986. Roger Martz had **nothing** to do with the investigation of the arsenic poisoning murder of Sgt. James Goodyear. Roger Martz had **nothing** to do with the investigation of the drowning death of Michael Goodyear. Roger Martz had **nothing** to do with the investigation of the arsenic poisoning death of Bobby Morris. Buenoano's postconviction challenge to the stipulated contents of the capsules which made one of the Williams rule witnesses violently ill in **1982,** is procedurally barred. As CCRC concedes, Buenoano is *not mentioned anywhere* in the voluminous OIG Report. Moreover, as evidenced by the index to the ten documents which remain sealed, these materials are from 1991 through 1995 and none of them relate to Martz' testimony in the Buenoano case. No matter how many requests she makes for thousands of FBI documents which have no connection to her murder conviction and death sentence, Buenoano is not entitled to postconviction relief or a stay of execution under the guise of "newly discovered" evidence.

STATEMENT OF THE CASE AND FACTS

The State of Florida cannot accept Buenoano's Statement of the Case and Facts, which is replete with extra-record conclusions unsupported by any factual evidence in this record. The State of Florida directs this Court's attention to the following chronology and statement of facts.

Chronology of Events

Summer, 71	Buenoano's husband, Sgt. James E. Goodyear, returns from Viet Nam. (TR. 238)
	According to Debra J. Sims, who lived with the family, after Goodyear was home for a couple of months, he became sickly. She witnesses Sgt. Goodyear hallucinating about rabbits on his bed. (TR. 661)
	On five occasions, Buenoano tells Constance Lang that she is unhappy in her marriage and could solve her problems by putting arsenic or poison in Goodyear's food. (TR. 470)
09/16/71	Buenoano's husband, Sgt. James E. Goodyear, hospitalized for extreme nausea, vomiting, hallucinations, dies (TR. 245) (arsenic poisoning).
10/20/71	Judy Goodyear (Buenoano) collects insurance benefits from death of Sgt. James E. Goodyear ($33,000 insurance & $62,642.46 VA benefits) (TR. 445-447)
01/01/72	Lodell Morris meets Buenoano and Buenoano later admits to her that she killed her husband, James Goodyear. (TR. 698)
Jan., 1972	Buenoano suggests to Beverly Owens that she solve her marital problems by poisoning her husband. (TR. 661)
11/-12/77	Multiple life insurance policies issued on the life of Bobby Joe Morris, Buenoano is

	beneficiary. (TR. 721-727; 735-737; 745-748)
01/28/78	Buenoano's common-law husband, Bobby Joe Morris, hospitalized for extreme nausea, vomiting, hallucinations, dies (arsenic poisoning). (TR. 759-761; 772; 778)
03/22/78	Additional life insurance purchased on Michael Goodyear (Buenoano v. State, 478 So. 2d 387 (1st DCA 1985))
04/30/78	Buenoano collects insurance benefits from death of Bobby Joe Morris ($23,000 & home mortgage paid off) (TR. 730-731)
05/13/80	Buenoano's 19-year old paralyzed son, Michael Goodyear, drowns, one day after he is discharged from the hospital to the care of his mother. (Buenoano v. State, 478 So. 2d 387 (Fla. 1st DCA 1985))
Fall, 1980	Buenoano receives over $100,000 in insurance benefits from death of Michael Goodyear. (Buenoano v. State, 478 So. 2d 387 (Fla. 1st DCA 1985))
08/25/82	Buenoano is beneficiary on John Gentry's life insurance policies ($500,000). (TR. 941)
12/15/82	Buenoano's fiance, John Gentry, is hospitalized for extreme nausea/vomiting. (TR. 955-956)
12/28/82	Gentry is released from hospital. Buenoano again gives Gentry Vicon-C capsules, suggesting he double the dose, and convulsions and vomiting return. Gentry refuses to take the Vicon-C and saves them. (TR. 1030; 958-959)
06/25/83	John Gentry is invited to have dinner with Buenoano and her friends. At Buenoano's suggestion, Gentry parks his car in a remote location and leaves the restaurant alone. Gentry is critically injured when a bomb, triggered by the lights, explodes. (TR. 1497)

06/06/84 Buenoano is sentenced to life imprisonment for the first-degree murder/drowning death of Michael Goodyear. (Verdict 03/31/84)(Santa Rosa County).

11/06/84 Buenoano is sentenced to 12 years imprisonment for attempted first-degree murder of car bombing victim, John Gentry. (Verdict 10/18/84)(Escambia County). (TR. 3278)

11/26/85 Buenoano is sentenced to death for first-degree murder in the arsenic poisoning death of Sgt. James E. Goodyear. (Verdict 11/01/85)(Orange County). (TR. 2313; 2334)

POST-CONVICTION PROCEEDINGS

12/21/89 Buenoano files 3.850 motion and Petition for Writ of Habeas Corpus (alleging 21 grounds)

06/05/90 Buenoano files second Rule 3.850 motion for post-conviction relief, alleging cruel and unusual punishment claim.

06/21/90 Buenoano files Petition for Writ of Habeas Corpus in federal court.

06/22/90 Federal District Court denies habeas relief and Buenoano appeals to the 11th Circuit. (Buenoano v. Singletary, 963 F. 2d 1433)

Jan., 1994 Federal District Court holds second evidentiary hearing on two claims remanded-ineffective assistance and alleged conflict of interest.

06/30/94 Federal District Court denies Petition for Writ of Habeas Corpus and dismisses cause with prejudice.

01/25/96 Eleventh Circuit denies relief on all claims. (Buenoano v. Singletary, 74 F. 3d 1078)

12/02/96 **U.S.** Supreme Court denies certiorari. (Buenoano v. Singletary, 117. S.Ct. 520)

03/04/98 Buenoano files her third Rule 3.850 motion.

Direct Appeal

By the time of her 1985 murder trial in Orlando for the 1971 arsenic poisoning of her husband, James Goodyear, Buenoano already had been convicted in Santa Rosa County for the first degree murder of her paralyzed son, Michael, and the attempted first-degree murder in Escambia County of car bombing victim, John Gentry. In **1988**, this Court set forth the following summary of the facts surrounding Buenoano's first degree murder conviction and death sentence:

> On August 31, 1984, Buenoano was indicted for first degree murder for the September 16, 1971 death by suspected arsenic poisoning of her husband, Sergeant James E. Goodyear. Evidence at trial revealed that, shortly after Sergeant Goodyear returned to Orlando from a tour of duty in South Vietnam, he began suffering from nausea, vomiting and diarrhea. When hospitalized at the naval hospital in Orlando on September 13, 1971, Goodyear reported to Dr. R.C. Auchenbach that he had been ill with these symptoms for two weeks. When Dr. Auchenbach could find no explanation for these symptoms, he attempted to stabilize Goodyear's condition but these attempts failed. Goodyear suffered fluid overload and pulmonary congestion and died as a consequence of cardiovascular collapse and renal failure.
>
> No toxicological assay was performed at the time of Goodyear's death because there was no reason to suspect toxic poisoning. However, Dr. Auchenbach testified that, had he known in 1971 arsenic was present in Goodyear's body, his medical opinion would be that Goodyear could have died as a result of acute arsenic toxication because circulatory collapse and the other symptoms Goodyear exhibited are manifestations of acute arsenic poisoning.
>
> Forensic toxicologist Dr. Leonard Bednarczyk analyzed tissue samples from the exhumed body of Goodyear. He testified that the level of arsenic found in the liver, kidneys, hair and nails of Goodyear indicated chronic exposure to arsenic poison. The

opinion of Dr. Bednarczyk and Dr. Thomas Hegert, the Orange County medical examiner who autopsied Goodyear's remains in 1984, was that Goodyear's death was the result of chronic arsenic poisoning occurring over a period of time.

In addition to the medical evidence regarding Goodyear's condition, Debra Sims, who lived with Buenoano and Goodyear shortly before Goodyear's death, testified that Goodyear became sick gradually and that she witnessed him having hallucinations about a rabbit on his bed as he picked at the bed linens. She also testified that Buenoano hesitated to take Goodyear to the hospital when he became ill. Two of Buenoano's acquaintances, Constance Lang and Mary Beverly Owens, both testified that Buenoano discussed with each of them on separate occasions the subject of killing a person by adding arsenic to his food. Owens and Lodell Morris each testified that Buenoano admitted she killed Goodyear.

Evidence was also presented at trial that Bobby Joe Morris, with whom Buenoano lived after Goodyear's death, became ill and died after exhibiting the same symptoms of vomiting, nausea, fever and hallucinating that Goodyear exhibited before his death. When Morris' remains were exhumed in 1984, the tissue analysis revealed acute arsenic poisoning.

After Morris' death Buenoano and John Gentry began living together and later became engaged. Gentry testified at trial that Buenoano told him Goodyear died in a plane crash in Vietnam and Morris died of alcoholism. In November of 1982, Gentry caught a cold, and Buenoano began giving him the vitamin C capsule Vicon C to treat it. Because he was experiencing extreme nausea and vomiting, Gentry checked into a hospital on December 15, 1982. After a full recovery he returned home, and on that same day Buenoano gave him Vicon C capsules again. The nausea and vomiting returned. Gentry had the capsules chemically analyzed, and the capsules were found to contain paraformaldehyde, a class III poison. Testimony at trial was that Buenoano had been telling her associates Gentry was suffering from terminal cancer. [e.s.]

Following Goodyear's death in 1971, Buenoano collected the benefits from various life insurance policies on her husband's life totalling approximately

> **$33,000.** She also received $62,000 in dependency indemnity compensation from the Veterans Administration. When Bobby Joe Morris died, Buenoano again received insurance money from three separate policies on Morris' life totalling approximately $23,000. The house mortgage was also paid off. Buenoano owned life insurance on Gentry's life totalling $510,000 in benefits, and she was a 50% beneficiary under his will,
>
> Buenoano v. State, **527** So.2d 194 (Fla. 1988)

Aggravating Factors

The jury recommended a sentence of death by a vote of ten to two. The trial judge found four aggravating circumstances: (1) Buenoano had been convicted previously of a capital felony or of a felony involving the use or threat of violence to the person; (2) the murder was committed for pecuniary gain; (3) the murder was especially heinous, atrocious, and cruel; and (4) the murder was committed in a cold, calculated, and premeditated manner. The court found no mitigating circumstances and sentenced Buenoano to death. Buenoano v. Sinuletary, 74 F.3d 1078, 1080-1081 (11th Cir. 1996).

Williams Rule evidence

Roger Martz, the FBI analyst in the attempted murder case involving *one* of the Williams rule witnesses, car-bombing victim John Gentry, was not called to testify in the Orange County murder prosecution involving the 1971 arsenic poisoning death of James Goodyear. Instead, the parties stipulated that the capsules retrieved from Mr. Gentry "were subsequently forwarded to the

Federal Bureau of Investigation's laboratory in Washington D.C., and examined by a chemist by the name of Roger Markz [sic] of the FBI. Mr. Markz determined that the capsules were Vicon C, and that the substance contained inside of those capsules was paraformaldehyde, class III poison." (TR. 1012)[1].

During the defense case in Orange County, in response to the Williams rule evidence, Buenoano presented the stipulated testimony of Dr. Potter, a pathologist who obtained the capsules from the Pensacola Police Department. According to this stipulation:

> [DEFENSE COUNSEL] . . . If Dr. Potter were here to testify, he would testify as an expert witness and he would say that the Vi-con capsule contained approximately one and a half grams of substance.
>
> He would further testify that in tests performed on animals, for that to be a lethal dose, it would take between seventy and one hundred and forty of the one and a half gram capsules that contained paraformaldehyde to be lethal and that those capsules would have to be taken all at one time.
>
> Doctor Potter would further testify that an individual taking that one and a half gram capsule containing paraformaldehyde over some period of time, that this could cause some type of an inflammation and that this inflammation could cause some serious condition in the body and that that condition may be fatal. However, Doctor Potter would say in his opinion the chances of that happening are rather low. . ."
>
> (TR. 1070)

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[1]The capsules found to contain paraformaldehyde were not destroyed until 1992, six years after the Escambia trial involving car-bombing victim John Gentry. See, Certificates of Evidence Disposition/Destruction, Escambia County. (R. 695-705)

On direct appeal, this Court rejected Buenoano's challenge to the introduction of Williams rule evidence involving the two similar fact victims -- the arsenic poisoning death of Bobby Joe Morris and the attempted murder of John Gentry. As this Court stated,

> . . . Buenoano first claims it was error for the trial court to admit collateral crimes evidence regarding the arsenic poisoning of Bobby Joe Morris and the attempted poisoning of John Gentry in violation of the Williams rule. Williams v. State, 110 So.2d 654 (Fla.), cert. denied, **361** U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). Buenoano contends that the collateral crimes evidence was admitted only to show bad character and criminal propensity of the accused.
>
> Under the Williams rule evidence of other crimes, wrongs and acts is admissible if it is relevant to and probative of a material issue even though the evidence may indicate the accused has committed other uncharged crimes or may otherwise reflect adversely upon the accused's character. Section 90.404(2)(a), Florida Statutes, (1983), codifies the ruling in Williams v. State and lists the purposes for which such evidence is deemed to be admissible: proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> Because of the potential for prejudice to the defendant's case, evidence of collateral crimes will not be admitted solely on the basis of mere similarity between the crime charged and the collateral crimes. For collateral crimes to be admissible there must be something so unique or particularly unusual about the perpetrator or his modus operandi that introduction of the collateral crimes evidence would tend to establish that he committed the crime charged. Chandler v. State, **442** So.2d 171 (Fla. 1983).
>
> **In the case at bar we find poisoning to be a particularly unusual modus operandi to warrant the introduction of the collateral crimes evidence. When compared, the details of each offense are strikingly similar. All three victims established a close**

> **relationship with Buenoano either as her husband, common-law husband or fiance. While living with her, each victim became seriously ill, requiring hospitalization upon displaying similar symptoms. A poison was used in all three cases. Buenoano was the beneficiary under a number of life insurance policies issued on the lives of the three victims and was also entitled to other monetary benefits upon the victims' deaths. These details are not merely evidence of a general similarity between the charged offense and the collateral crimes.** "These points of similarity 'pervade the compared factual situations' and when taken as a whole are 'so unusual as to point to the defendant.' " Kight v. State, 512 So.2d 922, 928 (Fla.1987) (quoting Drake v. State, **400** So.2d 1217, 1219 (Fla.1981)). Under these facts the collateral crimes evidence was admissible to prove motive, opportunity, identity, intent, and absence of mistake, and to show a common plan or scheme.
>
> (e.s.) Buenoano v. State, 527 So.2d at 196-197

State Post-Conviction Proceedings

On November 8, 1989, the Governor signed a death warrant and Buenoano's execution was scheduled for January 25, 1990. Thus, in 1989, Buenoano reviewed the State's public records in connection with what has now proved to be only the first of her series of post-conviction proceedings. On December 21, 1989, Buenoano filed a Rule 3.850 motion for postconviction relief in the trial court, and simultaneously filed a petition for writ of habeas corpus in the Florida Supreme Court and requested a stay of execution. On January 24, 1990, this Court stayed the execution. On April 5, 1990, this Court upheld the trial court's summary denial of Buenoano's motion for postconviction relief and denied her petition for a writ of habeas corpus. Buenoano v. Dugger, 559 so. 2d 1116

(Fla. 1990).[2] Although Buenoano initially challenged her prior

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[2] As this court noted in Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990), "The grounds urged for relief in the habeas petition and the appeal of the denial of the rule 3.850 motion overlap and are as follows: (1) the trial court gave improper jury instructions for the aggravating factor of heinous, atrocious, and cruel; (2) the sentencing proceeding was unreliable because the state presented unrebuttable hearsay testimony; (3) the state presented impermissible victim impact information during the guilt phase and the penalty phase in violation of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); (4) Florida's current death penalty statute, enacted after the charged offense was committed, was improperly applied retroactively; (5) the trial court erred in allowing the state to introduce inadmissible Williams (FN1) rule evidence; (6) the trial court erred in failing to find any mitigating circumstances; (7) the trial court failed to properly weigh the aggravating and mitigating circumstances; (8) the state presented improper arguments during the guilt phase and the penalty phase; (9) the jury was given instructions that improperly shifted the burden to Buenoano to prove that death was inappropriate; (10) the jury was improperly told that sympathy and mercy toward Buenoano were improper considerations; (11) the trial court improperly instructed the jury on the application of the cold, calculated, and premeditated aggravating circumstance; (12) Buenoano was denied a fair trial because she stood trial in leg irons; (13) the sentencing jury was misled by instructions given by the trial court and arguments made by the state that diluted its sense of responsibility for sentencing; (14) the trial court improperly instructed the jury that a verdict of life requires a majority vote; (15) the sentencing jury was improperly instructed on the aggravating factor of pecuniary gain; (16) Buenoano's death sentence is unconstitutional because her prior convictions, which were used in aggravation, were unconstitutionally obtained; (17) Buenoano was denied effective assistance of counsel for failing to argue error under Richardson v. State, 246 So.2d 771 (Fla.1971); (18) Buenoano was denied effective assistance of counsel for counsel's failure to obtain a waiver from Buenoano concerning the statute of limitations on any applicable lesser included offenses; (19) Buenoano was denied effective assistance of counsel for counsel's failure to provide a complete record on appeal; (20) Buenoano was denied effective assistance of counsel for counsel's failure to investigate and present information in mitigation regarding Buenoano's background; and (21) Buenoano was denied effective assistance of counsel due to a conflict of interest between Buenoano and trial counsel over a contract they entered with each other concerning book and film proceeds.

Buenoano v. Dugger, 559 So. 2d 1116; 1118 (Fla. 1990)

convictions in her initial 1990 post-conviction appeal, she then abandoned the challenge, conceding this claim as not ripe for review. Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990).

On May 17, 1990, the Governor signed a second death warrant for Buenoano. On June 5, 1990, Buenoano filed a second motion for postconviction relief, alleging a cruel and unusual punishment claim premised on the use of the electric chair. On June 12, 1990, the trial court summarily denied Buenoano's second motion for post-conviction relief and this Court affirmed on June 20, 1990. Buenoano v. State, 565 So. 2d 309 (Fla. 1990). The next day, Buenoano sought habeas relief in federal court.

Federal Habeas Corpus Proceedings

On June 21, 1990, Buenoano filed a petition for writ of habeas corpus in federal court pursuant to 28 U.S.C. §2254. The district court held an evidentiary hearing on two of Buenoano's 21 claims for relief: (1) her Eighth Amendment claim (relating to Florida's use of the electric chair) and (2) ineffective assistance of trial counsel due to an alleged conflict of interest. On June 22, 1990, the district court denied habeas relief and she appealed to the Eleventh Circuit." On appeal, the Eleventh Circuit remanded the

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'Buenoano raised the following issues on appeal to the Eleventh Circuit in Buenoano v. Sinaletary, 11th Cir. Case No. 90-3525: (1) that the district court failed to give her a full and fair evidentiary hearing on her claims; (2) that she was denied the effective assistance of counsel at the sentencing phase of her trial due to her attorney's failure to investigate, discover and

case to the district court for a further evidentiary hearing on two of Buenoano's habeas claims -- conflict of interest and ineffective assistance of counsel at the penalty phase. Buenoano v. Sinaletary, 963 F. 2d 1433 at 1436 (11th Cir. 1992). The Eleventh Circuit court also retained jurisdiction over the appeal in order to address all issues following disposition of the two claims remanded to the district court. Id. at 1440.

In January of 1994, the federal district court held a second, extensive evidentiary hearing on the two claims which were remanded -- ineffective assistance of counsel at the penalty phase and

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present mitigating evidence concerning her background and mental health; (3) that she was denied effective assistance of counsel at both phases of her trial and on direct appeal because her counsel had a conflict of interest arising from a book and movie rights contract concerning her case; (4) that she was denied her Fifth, Sixth, Eighth, and Fourteenth Amendment rights due to the trial court's failure to instruct the jury on the lesser included offense of premeditated murder and by her counsel's and the court's failure to give her a choice between waiving the expired statute of limitations and having the benefit of the lesser included offense instructions or asserting the statute of limitations on the lesser included offenses; (5) that the 1973 version of Florida's death penalty statute, Fla.Stat.Ann. 775.082, was unconstitutionally applied to this case where the offense of conviction occurred in 1971; (6) that her right to a reliable capital sentencing proceeding was violated by the state's introduction of victim impact information and unrebuttable hearsay testimony; (7) that her appellate counsel failed to render effective assistance by his failure to urge a claim of error under ***Richardson v. State, 246*** So.2d 771 (Fla.1971), because the state called a surprise expert witness which prejudiced her defense; and (8) that the trial court's penalty phase instructions and the prosecutor's argument unconstitutionally shifted the burden to Buenoano to prove that death was not appropriate, and that the trial court unduly limited full consideration of mitigating circumstances to those which outweighed aggravating circumstances.

Buenoano v. Sinaletary, 963 F.2d 1433, 1435 (11th Cir. 1992)

alleged conflict of interest. On June 30, 1994, the district court denied the petition for writ of habeas corpus and entered a 136-page written order dismissing the case, with prejudice. Buenoano appealed and, on January 25, 1996, the Eleventh Circuit denied relief not only on the two claims that had been remanded, but also on the claims over which it had retained jurisdiction. Buenoano v. Sinaletary, 74 F. 3d 1078 (11th Cir. 1996). Buenoano's Motion for Rehearing *en banc* was denied on April 23, 1996. Buenoano v. Sinuletary, 85 F. 3d 645 (11th Cir. 1996) [Table citation].

1996 Certiorari Review

United States Supreme Court Case #96-5947

In 1996, Buenoano filed a Petition for Writ of Certiorari in the United States Supreme Court presenting the following questions:

(1) Is a habeas petitioner in a capital case entitled to a federal evidentiary hearing to resolve her claim when she proffers facts demonstrating that neither her counsel nor the trial court informed her of the lesser included offense alternatives to capital murder, that she would have chosen to pursue them had she known they were available, and that the jury was never instructed on mandatory lesser included offense alternatives recognized by state law?

-1s the Eleventh Circuit's boilerplate, one-sentence denial of petitioner's claim that she was denied a reliable verdict because she was never informed of -- and the jury never had the chance to consider -- Florida's "lesser included" non-capital malice murder alternative consistent with this Court's jurisprudence?

-Should certiorari be granted to resolve the conflicts between the Eleventh Circuit's denial of relief on this claim and the decisions of other state and federal courts, the decisions of this Court, the decisions of the Florida Supreme Court (in cases other than petitioner's), and the decisions of the Eleventh Circuit (before petitioner's case was decided)?

-1s Townsend v. Sain, 372 U.S. 293 (1963), still the law that governs when a federal court must hold a hearing on a constitutional claim when one is not afforded in state court?

-1s the treatment petitioner's claim received in the lower court consistent with Beck v, Alabama, 447 U.S. 625 (1980), Spaziano v. Florida, 468 U.S. 447 (1984), and Strickland v. Washington, 466 U.S. 668 (1984)?

-In light of the Eleventh Circuit's cursory denial of a hearing and relief on this claim, should petitioner's case be remanded with instructions that the Eleventh Circuit explain the reason(s) for its decision?

(2) With respect to petitioner's claim of ineffective assistance of counsel at capital sentencing, is the District Court's and Eleventh Circuit's denial of relief consistent with Strickland v. Washington, 466 U.S. 668 (1984), and Strickland's concerns about the reliability of proceedings resulting in a capital sentence.

With respect to petitioner's claim of ineffective assistance of counsel at capital sentencing, should certiorari review be granted to resolve the conflicts between the Eleventh Circuit's approach -- an approach that looks to the value the federal reviewing court gives the mitigation -- and the approach of other Circuits, which look instead to whether the jury may have found a mitigator on the basis of the evidence trial counsel failed to investigate and present?

On December 2, 1996, the United States Supreme Court denied certiorari. Buenoano v. Sinaletary, ____ U.S. _____, 117 s. ct. 520, 136 L. Ed. 2d 408 (1996).

Third Death Warrant Proceedings

On December 9, 1997, the Governor signed a third death warrant for Buenoano. The execution is currently scheduled for *March 30, 1998.* Ironically, March 30th also marks the birthday of Buenoano's oldest child, Michael, the paralyzed son whom she murdered in 1980.

Third Emergency Rule 3.850 Motion to Vacate

On March 2, 1998, this Court transferred Buenoano's *Petition for Writ of Mandamus/Prohibition and to Invoke This Court's Extraordinary Jurisdiction to Issue All Writs Necessary to the Complete Exercise of Its Jurisdiction and Request for Stay of Execution,* filed in Buenoano v. Golden, et al, Fla. S. Ct. Case #92,450, to the Ninth Judicial Circuit in Orange County. According to this Court's Order, the trial court was directed to treat the petition as a Rule 3.850 motion, subject to amendment. The trial court was further directed to hold any hearing which may be necessary and rule on the request for relief raised in the this petition by March 9, 1998. It was further ordered that no appeal of the trial court's rulings in connection with these requests for relief shall be entertained until the court has ruled on any amended Rule 3.850 Motion. (R. 134).

On March 4, 1998, the trial court entered an order scheduling a Huff hearing and directed Buenoano to file an amended Rule 3.850 Motion by 5:00 p.m., Wednesday, March 4, 1998, and directed the State to file an amended response to the amended Rule 3.850 Motion by 12:OO Noon, Thursday, March 5, 1998. (R. 399-400). Buenoano filed an Emergency Motion to Vacate Judgment and Sentence with Request for Evidentiary Hearing and Stay of Execution on March 4, 1998. (R. 614-665). The following day, March 5, 1998, the State filed its Response in opposition to Buenoano's Third Rule 3.850

Emergency Motion to Vacate Judgment of Conviction and Death Sentence. (R. 418-476). On Friday, March 6, 1998, the trial court conducted a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) and Rule 3.851(c), Fla. R. Crim. Proc. Buenoano was present for this hearing.

On March 9, 1998, Buenoano filed a Supplemental Emergency Motion to Vacate Judgment and Sentence. (R. 706-729). That same day, the State filed its Response to Buenoano's Supplemental Emergency Motion to Vacate. (R. 734-738). In her third Rule 3.850 motion, as amended, Buenoano raised the following five claims:

> Claim I: Access to the files and records pertaining to Ms. Buenoano's case in the possession of certain state agencies has [sic] been withheld in violation of chapter 119, Florida Statutes, the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.
>
> Claim II: Ms. Buenoano has not received all of the information in the possession of the federal government with respect to the investigation into the FBI Crime Lab. Once full disclosure has occurred, she must be afforded a reasonable time within which to amend the instant motion.
>
> Claim III: Ms. Buenoano was denied a full adversarial testing of the critical exculpatory evidence during the guilt/innocence and penalty phases of his [sic] trial. Ms. Buenoano's Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated and confidence in the reliability of the verdicts in Ms. Buenoano's case was undermined because exculpatory evidence was not presented to the jury.
>
> Claim IV: Ms. Buenoano's sentence of death is based upon an unconstitutionally obtained prior conviction and therefore also on misinformation of constitutional magnitude in violation of the Eighth and Fourteenth Amendments.

> Claim V: Ms. Buenoano's Sixth Amendment right to a fair and impartial jury was violated when Juror Battle failed to disclose during jury selection that he had been convicted of involuntary manslaughter in Pennsylvania. Ms. Buenoano is entitled to a new trial.

Since this was a successive Rule 3.850 Motion, the trial court noted that it was incumbent upon Buenoano to first establish that

> (1) The facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (2) The fundamental constitutional right asserted was not established within the period provided for [within Rule 3.8501 and has been held to apply retroactively.
>
> Fla. R. Crim. P. 3.850(b)

(R. 759).

On March 9, 1998, in accordance with this Court's directive, the trial court entered a 28-page written order addressing Buenoano's third Rule 3.850 "Emergency Motion to Vacate Judgment and Sentence with Request for Evidentiary Hearing and Stay of Execution". (R. 755-782).

The trial court's order denying Buenoano's third Rule 3.850 motion to vacate, including Buenoano's amended motion, provides, in pertinent part:

CLAIM I

> **ACCESS TO THE FILES AND RECORDS PERTAINING TO MS. BUENOANO'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAS [SIC] BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLORIDA STATUTES, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION**

* * *

Buenoano has known the role in her case played by each of the agencies from which she has requested public records for well over a decade, with the exception of The Florida Bar; this Court is unable to fathom how The Florida Bar, or any records it may have, plays any role in Buenoano's conviction and sentence in this case. Nevertheless, through the exercise of due diligence, Buenoano could have and should have obtained any records pertaining to her conviction and sentence in this case from these agencies long ago and certainly before her third death warrant had been signed by the Governor.

Furthermore, with regard to the requests for public records that she sent out in 1997, Buenoano certainly could have sought resolutions of her claims that said agencies were not responding to her requests before February of 1998; instead, with the exception of the January 1997 public records requests which she sent to the Office of the State Attorney for the Ninth Judicial Circuit, the Orlando Police Department, and the Orange County Sheriff's Department,[3] she elected to wait until she was working under the exigencies of an active death warrant before attempting to obtain orders from this Court compelling said agencies to produce the requested records.

Despite the fact that through the exercise of due diligence Buenoano could have obtained records from these agencies long ago, and because the Florida Supreme Court has entered an order in this case which in effect ruled that Florida Rule of Criminal Procedure 3.852 does not apply to this proceeding, this Court has assisted Buenoano in her efforts to obtain records from said agencies by ordering them to provide the requested records or claim any exemptions which they believe apply, and by ordering representatives of said agencies to appear in court with the documents for which they claim any exemptions so that an in camera inspection of said documents could be conducted." However, despite the fact that Buenoano is indeed entitled to production of public records, and despite the fact that this Court has assisted and will continue to assist her in her efforts to ensure that all records which she has requested have

been produced to her, this Court declines to grant Buenoano a stay of execution and additional time in which to amend her **third** rule 3.850 motion so that she can obtain records from agencies which, through the exercise of due diligence, she could have and should have obtained long ago. If some document which she receives in response to her public records requests provides her with a factual basis for a claim that is predicated on facts which "were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence," then pursuant to rule 3.850(b)(1), she will be entitled to file another rule 3.850 motion.

With respect to her claim that she has received ineffective assistance of her current collateral counsel based upon her failure to obtain the requested records from said agencies, it is established that claims of ineffective assistance of postconviction counsel do not present a valid basis for relief. See Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996)(citing Murray v. Giarrantano, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed 2d 1 (1989) and Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987)).

Therefore, based upon the foregoing, this Court finds that Buenoano is not entitled to relief based on Claim I of her rule 3.850 motion.

CLAIM II

MS. BUENOANO HAS NOT RECEIVED ALL OF THE INFORMATION IN THE POSSESSION OF THE FEDERAL GOVERNMENT WITH RESPECT TO THE INVESTIGATION INTO THE FBI CRIME LAB. ONCE FULL DISCLOSURE HAS OCCURRED, SHE MUST BE AFFORDED A REASONABLE TIME WITHIN WHICH TO AMEND THE INSTANT MOTION.

In this claim, Buenoano argues she should be granted a stay of execution so that she may receive the remainder of the Federal Bureau of Investigation (FBI) documents pertaining to FBI Examiner Roger Martz and thereafter investigate and develop any potential claims she may have with regard to these documents.

With regard to Buenoano's assertion that she was prevented from "referring in [her rule 3.850 motion] or in open court to several pages of documents because the State's appeal of this Court's denial of a protective

order [was at the time she prepared her motion] undecided," the Court notes that only **ten** of the multitude of documents pertaining to FBI Examiner Roger Martz were under seal and that Buenoano was not prohibited in any way whatsoever from referring to the remainder of the documents.

The investigation at the FBI Laboratory that Buenoano referred to in her rule 3.850 motion resulted in the preparation and April 1997 release of a document entitled *"The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (hereinafter referred to as *'FBI Investigation Report')."* The allegations which caused the investigation to take place were brought to the Office of the Inspector General's (OIG) attention by Supervisory Special Agent Frederic Whitehurst, a Ph.D. scientist employed in the FBI Laboratory. *FBI Investigation Report, 1.* During the course of conducting its investigation, the OIG also investigated problems that it identified itself, as well as information brought to its attention by other employees in the Laboratory. Id.

The investigation spanned more than eighteen months and addressed a very large number of allegations. Id. Most of the hundreds of allegations made by Whitehurst were not substantiated; some important ones were. Id. at 1-2. Some of the allegations pertained to FBI Examiner Roger Martz.

Roger Martz became an examiner in the Chemistry-Toxicology Unit (CTU) of the FBI in 1980 and has been the chief of the CTU since July 1989. Id. at 445. The allegations regarding Roger Martz resulted in the OIE concluding that:

> Roger Martz lacks the credibility and judgment that are essential for a unit chief, particularly one who should be substantively evaluating a range of forensic disciplines. We found Martz lacking in credibility because, in matters we have discussed above, he failed to perform adequate analyses to support his conclusions and he did not accurately or persuasively describe his work. We recommend that Martz not hold a supervisory position. The Laboratory should evaluate whether he

> should continue to serve as an examiner or whether he would better serve the FBI in a position outside the Laboratory. If Martz continues to work as an examiner, we suggest that he be supervised by a scientist qualified to review his work substantively and that he be counseled on the importance of testifying directly, clearly and objectively, on the role of protocols in the Laboratory's forensics work, and on the need for adequate case documentation. Finally, we recommend that another qualified examiner review any analytical work by Martz that is to be used as a basis for future testimony.

Id. at 448.

Although Roger Martz did testify in the case arising out of Escambia County which resulted in the State obtaining a conviction against Buenoano for the attempted murder of John Gentry, Roger Martz did not testify in this case (the case which resulted in the State obtaining a conviction against Buenoano for the murder of James Goodyear). Martz's involvement in this case was merely the fact that he was mentioned in a stipulation that was placed into the record at the trial of this matter. Said stipulation provided as follows:

> [i]t's been stipulated by the State and the defense that the pills that Mr. Gentry testified to were retrieved by Detectives Chamberlain and Steele of the Pensacola Police Department, that those pills were taken into evidence by Officer Gwendolyn Fate, that she then in turn transmitted those pills to the Florida Department of Law Enforcement, where they were analyzed by a chemist by the name of Marion Estees.
>
> Mr. Estees determined, one, that the container of the capsules were Vicon C type capsules, two, that Mr. Estees was unable to determine the contents of the capsules.
>
> Those capsules were subsequently forwarded to the Federal Bureau of Investigation's laboratory in Washington, D.C., and examined by a chemist by the name of Roger Markz [sic] of the FBI. Mr. Martz [sic]

> determined that the capsules were Vicon C, and that the substance contained inside of those capsules was paraformaldehyde, Class III poison.
>
> It's been further stipulated by the State and the defense that search warrants were executed by the police, Pensacola Police Department, on the home and business of the defendant in July of 1983, in Pensacola, Florida, that as a result of the execution of that search warrant of her home there was no paraformaldehyde found, nor any arsenic.
>
> That as a result of the execution of the search warrant at her business, Fingers and Faces, there was no paraformaldehyde found there, nor was there any arsenic found there.

(Record on Direct Appeal following conviction (hereinafter 'R'), pages 1012-1013.)

This Court obviously has no knowledge of the bases upon which counsel for Buenoano and counsel for the State agreed to enter into the stipulation quoted above. However, that matter is irrelevant. Buenoano willingly agreed to enter into evidence a statement that Roger Martz examined the pills in the Gentry case, and that he concluded that those pills contained paraformaldehyde. Buenoano has not alleged that she was in any way prohibited from testing the pills, and if she contested Martz's finding that the pills contained paraformaldehyde, she could have conducted her own examination of said pills back at the time when she was on trial in Escambia County for the attempted murder of John Gentry.

Any claim that Buenoano received ineffective assistance of trial counsel because said stipulation was entered into evidence is procedurally barred because Buenoano has raised claims of ineffective assistance of trial counsel in a prior rule 3.850 motion. See Buenoano v. Dugger, 559 so. 2d 116 (Fla. 1990). It is well established that ineffective assistance of counsel claims cannot be raised on a piecemeal basis. See Pose v. State, 702 So. 2d 221 (Fla. 1997).

Any claim predicated upon the FBI documents

pertaining to Roger Martz would be a claim based upon either newly discovered evidence or Bradv evidence. n order to prevail on a claim of newly discovered evidence, the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of trial, it must appear that the defendant or his counsel could not have known them by the use of due diligence, and the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911 (Fla. 1991).

It is undisputed that prior to April 1997, the facts regarding the problems associated with Roger Martz's work on FBI cases were not known by the trial court, Buenoano, or counsel for either the State or Buenoano. In fact, most of the cases in which he apparently erred had not yet even occurred at the time of Buenoano's trial. Furthermore, it is clear that at the time of trial, said facts regarding the problems associated with his work could not have been known by Buenoano by the use of due diligence. Therefore, for purposes of determining whether Buenoano could prevail on a claim of newly discovered evidence, the issue becomes whether this evidence is "of such a nature that it would probably produce an acquittal on retrial." Id.

Evidence that there were problems with Roger Martz's work on cases most likely would have had some sort of impact on the evidence that the State presented with regard to the Gentry attempted murder. However, this evidence at most would have provided impeachment evidence, and based upon the evidence that the State presented at trial, which is referred to below, there is no reasonable probability that this evidence would produce an acquittal on retrial.

Moreover, even if none of the testimony or evidence regarding the Gentry case had been presented at trial, there was still significant evidence presented by the State to support Buenoano's guilt. Specifically, the State presented the testimony of Dr. R.C. Auchenbach and Dr. Leonard Bednarczyk, who both testified that they believed Mr. Goodyear's death was related to arsenic poisoning. (R. 233-333, specifically 264-267; R. 334-396, specifically 347-349).

Additionally, the State presented the testimony of Ms. Constance Lang. (R. 459-499.) Ms. Lang's testimony

included statements that she and Buenoano became "as close as sisters" (R. 461) and that Buenoano would "joke" with her about how they could solve their problems with their husbands by poisoning them with arsenic. (R. 463, 470, 480-486, 495-499).

The State also presented the testimony of Ms. Debra Sims. (R. 567-583.) Ms. Sims testified that Buenoano hesitated to take Goodyear to the hospital after he exhibited signs of illness. (R. 571-573, 575-578.)

Further, the State presented the testimony of Ms. Mary Beverly Owens. (R. 655-690.) Ms. Owens testified that Buenoano informed her that she could kill her husband with fly or some other type of insect poison and that there was "no way they could ever find out, because the autopsy won't show up unless they are really looking for that." (R. 660-664, 666-665, 686-688.) Further, Ms. Owens testified that Buenoano confessed to her that she had killed James Goodyear with arsenic. (R. 661, 674-679, 688, 690.)

Moreover, the State presented the testimony of Lode11 Morris. (R. 695-733.) Mr. Morris also testified that Buenoano told him she had killed her husband, James Goodyear. (R. 697-698, 715.) Furthermore, Mr. Morris testified as to how his son, Bobby Joe Morris, who had been living with Buenoano, died after exhibiting symptoms which were similar to the symptoms which Mr. Goodyear suffered from before his death. (R. 710.)

The State also presented testimony regarding the insurance policies that Buenoano had taken out on James Goodyear and Bobby Joe Morris. (R. 420-439; 719-733; 734-742; 743-748; 749-754.) Additionally, the State presented evidence that the death of Bobby Joe Morris was also the result of acute arsenic poisoning. (R. 756-789; 836-854; 857-867; 868-912; 919-947.) In light of all of this evidence, there is no way that the introduction of evidence regarding Martz's errors at the FBI Laboratory "would probably produce an acquittal on retrial." Id.

The test for determining the effect of the State's failure to disclose exculpatory evidence in violation of Bradv v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), is whether there is a reasonable probability that had the evidence been disclosed to the

defense, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985). The evidence concerning Roger Martz's errors at the FBI Laboratory constitutes, at most, impeachment evidence in light of the fact that Buenoano does not have any basis to assert that the conclusions he reached regarding the Vicon C capsules were erroneous. However, assuming arguendo that the Martz evidence constitutes exculpatory Brady evidence in this case, based upon all of the evidence specifically referred to above, there is no reasonable probability that the result of the proceeding would have been different had the evidence regarding Martz's problems at the FBI Laboratory been disclosed to the defense.

With regard to Buenoano's assertion that State agencies have obstructed the OIG's investigation of Roger Mart-z's work on the Buenoano cases, and that the State misled the OIG with regard to the role that Martz played in Buenoano's trials and convictions, the Court finds that the *FBI Investigation Report* was issued before the allegedly obstructive and deceptive practices of the State agencies. Furthermore, after apparently receiving correspondence from Buenoano's counsel regarding Martz's involvement in Buenoano's cases, the FBI sent a letter dated February 25, 1998 to Buenoano's counsel that states:

> We are in receipt of your letter, dated February 20, 1998, requesting permission to interview Frederic Whitehurst regarding any alleged role of the FBI Supervisory Agent (SSA) Roger Martz in the convictions obtained by the State of Florida against your client, Judy Buenoano. We hereby deny that request since we have determined that any such role that SSA might have played in your client's convictions was, at most, both collateral and remote.
>
> Upon investigation of SSA Martz's alleged role in the convictions against your client, we have determined that SSA Martz performed an analysis in an investigation that did not result in a charged crime. His analysis was only included, among other analyses, in

> testimony that was submitted into evidence as collateral crimes evidence by the prosecution. It is our understanding that SSA Martz did not testify in the trial of the charge for which Ms. Buenoano faces the death penalty. The crucial forensic evidence in the capital case appears to have been given by forensic toxicologist, Dr. Leonard Bednarczyk and the Orange County Medical Examiner, Dr. Thomas Hegert. Moreover, the poisoning case for which SSA Martz performed the analysis was not investigated by the Department of Justice Inspector General, and all findings concerning SSA Martz's performance in the laboratory were made public in his Report on the FBI Laboratory almost a year ago.
>
> For all these reasons, we deny your request to interview Frederic Whitehurst concerning this matter.

(emphasis in original). Thus, despite the fact that the OIG examined problems and cases that were pointed out to it by Whitehurst and problems that it discovered on its own during the course of its investigation, apparently nothing alerted the OIG to any errors with regard to Martz's work in the Buenoano Escambia County case. Since the extensive investigation was conducted and the report was issued before the alleged misconduct of the State agencies, this Court finds that Buenoano's claim that the State agencies have obstructed the OIG's investigation of Roger Martz's work on the Buenoano cases, and that the State misled the OIG with regard to the role that Martz played in Buenoano's trials and convictions does not provide a basis for relief.

Based upon the foregoing, this Court finds that Buenoano is not entitled to relief on Claim II of her rule 3.850 motion.

CLAIM III

MS. BUENOANO WAS DENIED A FULL ADVERSARIAL TESTING OF THE CRITICAL EXCULPATORY EVIDENCE DURING THE GUILT/INNOCENCE AND PENALTY PHASES OF HIS [SIC] TRIAL. MS. BUENOANO'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED AND CONFIDENCE IN THE

RELIABILITY OF THE VERDICTS IN MS. BUENOANO'S CASE WAS UNDERMINED BECAUSE EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY.

Buenoano's assertion that this claim is incomplete because she has not yet received information critical to investigate her case has already been discussed with regard to Claim I, and once again, this Court finds it does not entitle her to relief.

With regard to Buenoano's assertion that her ability to fully plead this claim was hampered by the outstanding protective orders preventing her from disseminating critical information, the Court once again notes that only **ten** of the multitude of documents pertaining to FBI Examiner Roger Martz are under seal and that Buenoano was not prohibited in any way whatsoever from referring to any of the documents that are not under seal.

In this claim, Buenoano asserts that the newly discovered evidence regarding Roger Martz shows that the State presented "misleading, inaccurate, and perjured testimony," that "this newly discovered information further establishes that unreliable and inadmissible scientific evidence was presented by the State[,] and that the State's witness affirmatively misled defense counsel as to the results of the scientific testing."

As stated above, Roger Martz did not testify in this case. Therefore, the claim that the State presented "misleading, inaccurate, and perjured testimony" and that "this newly discovered information further establishes that unreliable and inadmissible scientific evidence was presented by the State and that the State's witness affirmatively misled defense counsel as to the results of the scientific testing" is baseless.

As previously stated, Buenoano willingly agreed to enter into evidence a statement that Roger Martz examined the pills in the Gentry case, and that he concluded that those pills contained paraformaldehyde. Buenoano has not alleged that she was in any way prohibited from testing the pills, and if she contested Martz's finding that the pills contained paraformaldehyde, she could have conducted her own examination of said pills back at the time when she was on trial in Escambia County for the attempted murder of John Gentry.

Any claim that Buenoano received ineffective assistance of trial counsel because said stipulation was entered into evidence is procedurally barred because Buenoano has raised claims of ineffective assistance of trial counsel in a prior rule 3.850 motion. Buenoano cannot raise her ineffective assistance of counsel claims on a piecemeal basis. See Pope v. State, 702 So. 2d 221 (Fla. 1997).

The information regarding Roger Martz would not have any effect on the outcome of a retrial. At the guilt phase of the trial, as set forth above, either with the impeachment evidence regarding Roger Martz, or without any reference whatsoever to the attempted murder of John Gentry, there was ample evidence to show beyond a reasonable doubt that Buenoano committed the murder of James Goodyear. Furthermore, with regard to the penalty phase of the trial, in addition to presenting evidence that Buenoano not only attempted to poison Gentry, but that she also attempted to kill Gentry with a car bomb, the State presented the testimony of Russell Edgar, Jr.

Mr. Edgar was the prosecutor from the Office of the State Attorney for the First Judicial Circuit who prosecuted Buenoano for the murder of her son, Michael. Buenoano was convicted of that murder, sentenced to life imprisonment, and her conviction and sentence of life imprisonment were affirmed on appeal. (R. 1551-1608.) Based upon all of the evidence presented to the jury at both the guilt and penalty phases of the trial, there is no reasonable probability that the result of the proceedings or sentence imposed would have been any different had the information regarding Martz been presented, or had all references to the Gentry case been omitted from the State's presentation of evidence.

Once again, with respect to Buenoano's claim that she received ineffective assistance of counsel for her trial counsel's failure to learn about the problems with Roger Martz at the FBI Laboratory, this claim is procedurally barred because Buenoano has previously raised claims of ineffective assistance of counsel, and she cannot continue to raise claims of ineffective assistance of counsel on a piecemeal basis. See Pose v. State, 702 So. 2d 221 (Fla. 1997).

With respect to Buenoano's claim that her trial counsel could have made a challenge under Frve v. United

States, 293 F. 1013 (D.C. Cir. 1923) to Martz's testimony regarding the testing methods he employed when testing the Vicon C capsules, the Court once again finds that Martz did not testify in this case. If Buenoano wanted to challenge Martz's test results or the testing methods he employed in order to reach those results, she should have made such challenges at the Escambia trial for John Gentry's attempted murder. Martz's involvement in this case was limited to a stipulation; he did not testify and the stipulation did not contain any statement regarding the testing methods which he employed when he tested the Vicon C capsules. Therefore there is no basis for Buenoano's Frye claim in this case.

Further, once again, the Court notes this evidence constituted nothing more than impeachment evidence. If the evidence was presented at trial, or if all references to the Gentry attempted murder were omitted from the trial, there is no reasonable probability that the result of the proceeding would have been any different.

Moreover, even when the evidence regarding Roger Martz is considered along with the evidence produced at trial and the evidence previously plead in Buenoano's prior rule 3.850 motion, there is no reasonable probability that the result of the proceedings would have been any different had all of the cumulative evidence been presented at trial. See State v, Gunsby, 670 So. 2d 920 (Fla. 1996); Swafford v. State, 679 So. 2d 736 (Fla. 1996).

Buenoano also claims that Orange County Prosecutor Belvin Perry himself placed great weight on Roger Martz's testimony because he made the following statement in a pre-trial letter to the FBI:

> [t]he testimony of Special Agent Martz is very important to the prosecution of this case. Without his testimony we will not be able to present any testimony concerning the attempted murder of John Gentry. This similar fact evidence is very critical, without it, the State will have a very weak case.

However, despite any assertions that Mr. Perry may have made prior to trial, the fact remains that Martz did not testify. Therefore, statements made in anticipation of litigation that may have been made in order to secure the

attendance of Roger Martz as a witness at the trial are irrelevant.

With respect to her claim that she has received ineffective assistant of her current collateral counsel because of "the government's refusal to provide access to their files in time for Ms. Buenoano to conduct a full investigation of this claim," as stated above, it is established that claims of ineffective assistance of postconviction counsel do not present a valid basis for relief. See Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996)(citing Murrav v. Giarrantano, 492 U.S. 1, 109 S. ct. 2765, 106 L. Ed 2d 1 (1989) and Pennsvlvania v. Finley,.481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987)).

Lastly, Buenoano's claim that this Court's "in camera adjudication of any potential Brady claims violated due process" is moot. In its order dated Monday, February 9, 1998, the Supreme Court of Florida ruled that "no rulings that have been made to date in connection with the documents which were the subject of the [Order Regarding State's Request for In Camera Inspection and Judicial Determination of Prosecutorial Obligation] that [had] been made [as of that date] in connection with the documents which were the subject of that order, either by [the Florida Supreme Court] or [this Court], shall be used to prejudice of either party in further postconviction proceedings." Therefore, all rulings with respect to those documents were effectively overruled. After the Supreme Court issued its order dated February 9, 1998, and prior to this date, this Court has not made any other rulings in regard to any potential Brady claims that Buenoano believes she may have. Therefore, because the findings made following the in camera inspection were effectively overruled, the in camera inspection did not violate Buenoano's due process rights.

Based upon the foregoing, the Court finds that Buenoano is not entitled to relief on Claim III of her rule 3.850 motion.

CLAIM IV

MS. BUENOANO'S SENTENCE OF DEATH IS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON

MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In this claim, Buenoano asserts that the presentation of an unconstitutionally obtained conviction, i.e., the Escambia County conviction for the attempted murder of John Gentry, "deprived [her] of a fair and reliable trial and capital sentencing determination." Buenoano's claim that she "can plead facts which, if true, entitle her to relief from her Escambia County conviction" does not provide her with a basis to obtain relief from the death sentence which was imposed upon her in this case. Neither this Court, nor the Florida Supreme Court, can review the legality of the conviction that Buenoano received in Escambia County. Callowav v. State, 699 So. 2d 849 (Fla. 3d DCA 1997); Bush v. State, 682 So. 2d 85 (Fla. 1996). If Buenoano wishes to pursue postconviction relief with regard to the Escambia County conviction, she should do so; this Court certainly is not hampering her efforts.

Furthermore, in her argument, Buenoano completely ignores that fact that at the penalty phase of the proceedings, the State also presented evidence of her conviction from Santa Rosa County for the first degree murder of her son, a conviction for which she is serving a sentence of life imprisonment. Therefore, even if the Escambia County conviction for the attempted murder of John Gentry had not been presented, the State presented evidence of another murder that Buenoano was convicted of.

Therefore, there was still another murder conviction as an aggravating circumstance to support the imposition of the death penalty in this case.

Based upon the foregoing, the Court finds that Buenoano is not entitled to relief on Claim IV of her rule 3.850 motion.

CLAIMV

MS. BUENOANO'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED WHEN JUROR BATTLE FAILED TO DISCLOSE DURING JURY SELECTION THAT HE HAD BEEN CONVICTED OF INVOLUNTARY MANSLAUGHTER IN PENNSYLVANIA. MS.

BUENOANO IS ENTITLED TO A NEW TRIAL.

In this claim, Buenoano alleges on February 19, 1998, her counsel learned through an anonymous tip that Juror J.B. Battle was convicted of involuntary manslaughter in Pennsylvania in 1978 and sentenced to one to three years imprisonment in a state institution. Buenoano contends this information is newly discovered evidence, and that based upon it, she is entitled to a new trial.

To prevail on a claim based upon this evidence, which Buenoano asserts is newly discovered evidence, Buenoano must show that: 1) the facts were previously unknown, 2) the facts could not have been known by the use of due diligence, and 3) the evidence would probably produce an acquittal on retrial. Jones, 591 So. 2d at 915. Buenoano has had over a decade to research and discover any alleged irregularities in the jurors' histories; thus, the fact that Juror Battle had a prior conviction could easily have been discovered through the exercise of due diligence. Thus, this claim is procedurally barred.

However, alternatively, the Court finds that the evidence that Juror Battle had a prior conviction would have absolutely no effect on the outcome of the proceedings, and it most certainly would not produce an acquittal on retrial.

Furthermore, Buenoano has not even attempted to assert how she was prejudiced by Juror Battle's presence on the jury. It seems that if anyone was prejudiced by the presence on the jury of an individual who had been convicted of manslaughter and who served time in a correctional institution, it would be the State.

Based upon the foregoing, the Court finds that Buenoano is not entitled to relief on Claim V of her rule 3.850 motion.

(R. 764-781).

SUMMARY OF THE ARGUMENT

Buenoano has not demonstrated a prima facie basis for relief on any of her successive post-conviction claims, therefore, her application for a stay of execution in connection with her third Rule 3.850 motion for post-conviction relief must be denied.

The trial court did not err in denying Buenoano's third Rule 3.850 motion to vacate based on any alleged Brady/Giglio or ineffective assistance of counsel claim.

The trial court did not err in denying postconviction relief and finding that Buenoano has established no basis to amend her third rule 3.850 motion based on investigations concerning the FBI crime lab.

Buenoano has not been denied any rights under Florida's public records law.

Buenoano's unchallenged prior convictions in Santa Rosa County and Escambia County do not constitute a basis for collateral relief in this third successive Rule 3.850 motion.

Buenoano's Sixth Amendment right to a fair and impartial jury was not violated when Juror Battle failed to disclose during jury selection that he had been convicted of involuntary manslaughter in Pennsylvania.

ARGUMENT

ISSUE I

BUENOANO HAS NOT DEMONSTRATED A PRIMA FACIE BASIS FOR RELIEF ON ANY OF HER SUCCESSIVE POST-CONVICTION CLAIMS, THEREFORE, HER APPLICATION FOR A STAY OF EXECUTION IN CONNECTION WITH HER THIRD RULE 3.850 MOTION FOR POST-CONVICTION RELIEF MUST BE DENIED.

Buenoano has put the "cart before the horse." As the following issues demonstrate, a stay will not promote the resolution of any issues before this court. Buenoano's latest motion to vacate asserts claims which are procedurally barred. Buenoano has not asserted due diligence during the preceding thirteen years and cannot demonstrate that any of her successive postconviction claims are based on "newly discovered" evidence which would *probably produce an acquittal on retrial.* Correll v. State, 698 So.2d 522 (Fla. 1997); Jones v. State, 591 So.2d 913 (1993).

Buenoano complains that she had less than 24 hours to submit her amended Rule 3.850 motion to vacate. In fact, Buenoano has had the last 13 years to bring her most recent postconviction claims to the court. Her complaints, while "newly asserted," do not remotely qualify as "newly discovered evidence" in this successive postconviction proceeding. Buenoano's allegations involve three categories of complaints, all of which have been available to her since the day of her conviction. First, the results of the lab

tests conducted by Roger Martz have been known to Buenoano for more than a decade. Those results were admitted by *stipulation* in her Orange County trial for the arsenic poisoning murder of Sgt. James Goodyear in 1985. Buenoano affirmatively waived any right to challenge the stipulated results introduced at trial in 1985. This issue is procedurally barred. Second, Buenoano has known of the validity of her prior convictions for the drowning murder of her disabled son, Michael, and the attempted murder of car-bombing victim, John Gentry, since 1984. Buenoano could have, but has not, challenged her prior convictions during the preceding 14 years. In fact, in 1990, Buenoano abandoned a claim before this court that her prior convictions were invalid. See, Buenoano v. Dugger, 559 so. 2d 1116 (Fla. 1990). This issue is procedurally barred. Third, Juror Battle's questionnaire, completed at the time of trial, was available to Buenoano at trial and also provided to her in her 1989 public records review. Any claim purportedly based on Juror Battle is procedurally barred.

This is the third death warrant for Judy Buenoano. She has had two prior postconviction motions -- one in 1989 and one in 1990. Buenoano also has received two federal evidentiary hearings in the district court, the first in 1990 and the second federal evidentiary hearing in 1994.

Buenoano asserts that a stay is necessary to enable her to

review thousands of pages of requested FBI materials relating to Frederic Whitehurst's allegations in dozens of other cases. However, the Escambia County trial for the attempted murder of car-bombing victim John Gentry occurred in 1984. The Orange County trial for the arsenic poisoning murder of Sgt. James Goodyear occurred in 1985. Frederic Whitehurst, the former FBI lab analyst upon whom Buenoano greatly relies, did not even start working in the FBI lab until 1986. Therefore, Whitehurst could not possibly have had any personal knowledge pertaining any tests conducted prior to 1986. Mr. Martz conducted the lab analysis of the Vicon C capsules in the John Gentry case and testified at the Escambia County trial in 1984. Regardless of what is contained within the thousands of pages of FBI materials requested by Buenoano relating to the OIG report, none of them pertain to any allegations by Whitehurst which preceded his tenure with the FBI Lab.

Buenoano cannot have it both ways. If Whitehurst, or any other expert, could have reviewed the Martz' results in 1984 and subjected them to impeachment, her claim fails for lack of due diligence. Moreover, since the test results were introduced via stipulation, Buenoano waived any cross-examination and any evidentiary challenge. Any belated attack on the stipulated admission of test results concerning the contents of the capsules which made John Gentry violently ill is procedurally barred.

If Whitehurst is the only person in the entire U.S.A. who can be found to now arguably impeach Martz' testing and results, then it must be directly attributable to Whitehurst's uncanny ability to know that whatever Martz did two years before Whitehurst arrived at the lab, it could not have been correct. Buenoano might as well demand a stay based on Whitehurst's speculative criticisms in thousands of other cases which preceded his tenure. We know the extent of Roger Martz' participation in the Escambia County prosecution and his even more tangential participation in the Orange County prosecution for the arsenic poisoning of James Goodyear. Those circumstances are not going to be changed. Buenoano cannot change the history of Martz' participation in the Escambia County prosecution or the Orange County prosecution. None of the Whitehurst criticisms make any difference and none warrant postconviction relief for Judy Buenoano.

The trial court correctly declined to grant Buenoano a stay of execution and additional time in which to amend her **third** rule 3.850 motion so that she can obtain records and present claims, which, through the exercise of due diligence, she could have and should have concluded long ago. A stay of execution should be denied when a defendant fails to demonstrate that she might be entitled to post-conviction relief. Compare, State v. Sireci, 502 So.2d 1221 (Fla. 1987); Spalding v. Dusger, **526** So.2d 71 (Fla. 1988); State ex rel Russell v. Schaeffer, 467 So.2d 698

(Fla 1985); State v. Crews, 477 So.2d 984 (Fla. 1985); O'Callahan v. State, 461 So.2d 1354 (Fla. 1984). No stay of execution is justified in the instant case. See Delo v. Stokes, 495 U.S. 320, 110 S.Ct. 1880, 109 L.Ed.2d 325 (1990); Antone v. Dugger, 465 U.S. 200, 104 S.Ct. 62, 79 L.Ed.2d 147 (1984).

Buenoano has presented no basis for requesting this stay other than her claim that an investigation into Martz's conduct must take place one way OK another. The Martz claim is not a colorable basis for granting relief. "A stay of execution pending disposition of a second or successive [motion] should be granted only when there are 'substantial grounds upon which relief might be granted.' " Bowersox v. Williams, 518 U.S. 345, 116 S.Ct. 1312, 134 L.Ed.2d 494 (1996), (quoting Delo v. Stokes, 495 U.S. 320, 321, 110 S.Ct. 1880, 1881, 109 L.Ed.2d 325 (1990), quoting Barefoot v. Estelle, 463 U.S. 880, 895, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983)). "Entry of a stay on a second or third [motion] is a drastic measure, and we have held that it is " 'particularly egregious' " to enter a stay absent substantial grounds for relief." Bowersox v. Williams, 518 U.S. 345, 116 S.Ct. 1312, 134 L.Ed.2d 494 (1996) (citation omitted); See, Booker v. Wainwriaht, 675 F.2d 1150 (11th Cir. 1982) (proper to grant a stay only if the petitioner has presented colorable, non-frivolous issues); Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (stay only justified when the petitioner presents claims which are debatable among

jurists of reason). As the United States Supreme Court stated in Gomez v. U.S. Dist. Court for Northern Dist. of California, 503 U.S. 653, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992), "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." Id. at 1653. Based on the foregoing arguments, the state maintains that it can be conclusively shown that Buenoano, based on the files and records before this Court, cannot establish any entitlement to relief. The request for stay of execution should be denied. Darden v. State, 521 So.2d 1103 (Fla. 1988)(court not required to issue a stay on a successive motion for post-conviction relief even if the same issue is pending in the United States Supreme Court in another case.)

ISSUE II

THE TRIAL COURT DID NOT ERR IN DENYING BUENOANO'S THIRD RULE 3.850 MOTION TO VACATE BASED ON ANY ALLEGED BRADY/GIGLIO O R INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

By way of clarification, it must be noted that Buenoano has now reversed the sequence in which issues II and III were presented in her Rule 3.850 motion to vacate. Therefore, the trial court's denial of relief on issue III of the postconviction motion now relates to issue II of this appeal. Similarly, issue II of the postconviction motion has now become Buenoano's issue III on appeal. In denying postconviction relief on this claim, the trial court found,

> [CLAIM III/Postconviction motion]
>
> Buenoano's assertion that this claim is incomplete because she has not yet received information critical to investigate her case has already been discussed with regard to Claim I, and once again, this Court finds it does not entitle her to relief.
>
> With regard to Buenoano's assertion that her ability to fully plead this claim was hampered by the outstanding protective orders preventing her from disseminating critical information, the Court once again notes that only ten of the multitude of documents pertaining to FBI Examiner Roger Martz are under seal and that Buenoano was not prohibited in any way whatsoever from referring to any of the documents that are not under seal.
>
> In this claim, Buenoano asserts that the newly discovered evidence regarding Roger Martz shows that the State presented "misleading, inaccurate, and perjured testimony," that "this newly discovered information further establishes that unreliable and inadmissible scientific evidence was presented by the State[,] and that the State's witness affirmatively misled defense

counsel as to the results of the scientific testing."

As stated above, Roger Martz did not testify in this case. Therefore, the claim that the State presented "misleading, inaccurate, and perjured testimony" and that "this newly discovered information further establishes that unreliable and inadmissible scientific evidence was presented by the State and that the State's witness affirmatively misled defense counsel as to the results of the scientific testing" is baseless.

As previously stated, Buenoano willingly agreed to enter into evidence a statement that Roger Martz examined the pills in the Gentry case, and that he concluded that those pills contained paraformaldehyde. Buenoano has not alleged that she was in any way prohibited from testing the pills, and if she contested Martz's finding that the pills contained paraformaldehyde, she could have conducted her own examination of said pills back at the time when she was on trial in Escambia County for the attempted murder of John Gentry.

Any claim that Buenoano received ineffective assistance of trial counsel because said stipulation was entered into evidence is procedurally barred because Buenoano has raised claims of ineffective assistance of trial counsel in a prior rule 3.850 motion. Buenoano cannot raise her ineffective assistance of counsel claims on a piecemeal basis. See Pope v. State, 702 So. 2d 221 (Fla. 1997).

The information regarding Roger Martz would not have any effect on the outcome of a retrial. At the guilt phase of the trial, as set forth above, either with the impeachment evidence regarding Roger Martz, or without any reference whatsoever to the attempted murder of John Gentry, there was ample evidence to show beyond a reasonable doubt that Buenoano committed the murder of James Goodyear. Furthermore, with regard to the penalty phase of the trial, in addition to presenting evidence that Buenoano not only attempted to poison Gentry, but that she also attempted to kill Gentry with a car bomb, the State presented the testimony of Russell Edgar, Jr.

Mr. Edgar was the prosecutor from the Office of the State Attorney for the First Judicial Circuit who prosecuted Buenoano for the murder of her son, Michael. Buenoano was convicted of that murder, sentenced to life

imprisonment, and her conviction and sentence of life imprisonment were affirmed on appeal. (R. 1551-1608.) Based upon all of the evidence presented to the jury at both the guilt and penalty phases of the trial, there is no reasonable probability that the result of the proceedings or sentence imposed would have been any different had the information regarding Martz been presented, or had all references to the Gentry case been omitted from the State's presentation of evidence.

Once again, with respect to Buenoano's claim that she received ineffective assistance of counsel for her trial counsel's failure to learn about the problems with Roger Martz at the FBI Laboratory, this claim is procedurally barred because Buenoano has previously raised claims of ineffective assistance of counsel, and she cannot continue to raise claims of ineffective assistance of counsel on a piecemeal basis. See Pope v. State, 702 So. 2d 221 (Fla. 1997).

With respect to Buenoano's claim that her trial counsel could have made a challenge under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) to Martz's testimony regarding the testing methods he employed when testing the Vicon C capsules, the Court once again finds that Martz did not testify in this case. If Buenoano wanted to challenge Martz's test results or the testing methods he employed in order to reach those results, she should have made such challenges at the Escambia trial for John Gentry's attempted murder. Martz's involvement in this case was limited to a stipulation; he did not testify and the stipulation did not contain any statement regarding the testing methods which he employed when he tested the Vicon C capsules. Therefore there is no basis for Buenoano's Frve claim in this case.

Further, once again, the Court notes this evidence constituted nothing more than impeachment evidence. If the evidence was presented at trial, or if all references to the Gentry attempted murder were omitted from the trial, there is no reasonable probability that the result of the proceeding would have been any different.

Moreover, even when the evidence regarding Roger Martz is considered along with the evidence produced at trial and the evidence previously plead in Buenoano's prior rule 3.850 motion, there is no reasonable probability that the result of the proceedings would have

been any different had all of the cumulative evidence been presented at trial. See State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Swafford v. State, 679 So. 2d 736 (Fla. 1996).

Buenoano also claims that Orange County Prosecutor Belvin Perry himself placed great weight on Roger Martz's testimony because he made the following statement in a pre-trial letter to the FBI:

> [t]he testimony of Special Agent Martz is very important to the prosecution of this case. Without his testimony we will not be able to present any testimony concerning the attempted murder of John Gentry. This similar fact evidence is very critical, without it, the State will have a very weak case.

However, despite any assertions that Mr. Perry may have made prior to trial, the fact remains that Martz did not testify. Therefore, statements made in anticipation of litigation that may have been made in order to secure the attendance of Roger Martz as a witness at the trial are irrelevant.

With respect to her claim that she has received ineffective assistant of her current collateral counsel because of "the government's refusal to provide access to their files in time for Ms. Buenoano to conduct a full investigation of this claim," as stated above, it is established that claims of ineffective assistance of postconviction counsel do not present a valid basis for relief. See Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996)(citing Murray v. Giarrantano, 492 U.S. 1, 109 S. ct. 2765, 106 L. Ed 2d 1 (1989) and Pennsylvania v. Finley, .481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987)).

Lastly, Buenoano's claim that this Court's "in camera adjudication of any potential Brady claims violated due process" is moot. In its order dated Monday, February 9, 1998, the Supreme Court of Florida ruled that "no rulings that have been made to date in connection with the documents which were the subject of the [Order Regarding State's Request for In Camera Inspection and Judicial Determination of Prosecutorial Obligation] that [had] been made [as of that date] in connection with the documents which were the subject of

> that order, either by [the Florida Supreme Court] or [this Court], shall be used to prejudice of either party in further postconviction proceedings." Therefore, all rulings with respect to those documents were effectively overruled. After the Supreme Court issued its order dated February 9, 1998, and prior to this date, this Court has not made any other rulings in regard to any potential Bradv claims that Buenoano believes she may have. Therefore, because the findings made following the in camera inspection were effectively overruled, the in camera inspection did not violate Buenoano's due process rights.
>
> Based upon the foregoing, the Court finds that Buenoano is not entitled to relief on Claim III of her rule 3.850 motion.

The trial court's comprehensive denial of relief on this claim should be affirmed. Buenoano has not even made a prima facie showing of the existence of critical exculpatory evidence at the time of trial. Whitehurst did not work with Martz in the FBI Lab until 1986. Therefore, Whitehurst was not even in the FBI Lab at the time of the Buenoano investigations and trials. Buenoano's trial counsel was in no way inhibited from examining the methodology, protocols, testing procedures, conclusions, and analyses conducted by Roger Martz. At best, CCRC has a claim based on after-the-fact possible impeachment, nothing bearing directly on the testimony presented at trial or the validity of the results which were entered via stipulation in this case. Buenoano has never even challenged the findings of FDLE chemist Estees in the Escambia County prosecution, ***i.e.,*** that the capsules did not contain what the manufacturer's logo indicated. (R. 2743-2744). In

fact, there has been no showing that the capsules were not made available to Buenoano for independent testing. The capsules from Escambia County were not destroyed until 1992, six years after the Escambia County trial. (See Certificate of Evidence Disposition Destruction Escambia County.) Any belated complaint relating to the contents of the capsules is barred by the doctrine of laches.

Buenoano had the opportunity not only prior to trial, at trial, and following her trials for several years in which to challenge the test results which were admitted via stipulation. Buenoano's stipulation constituted an affirmative waiver of any complaint. This issue is procedurally barred. Buenoano has never argued that paraformaldehyde was not toxic or had any doubt about its toxicity. In fact, Buenoano introduced, via stipulation, the testimony of Dr. Potter concerning the level of toxicity in the capsules containing paraformaldehyde. It must be remembered furthermore, that the conviction in Escambia County was for the car bombing of John Gentry when the capsules, which made him violently ill, did not work.

Buenoano represents that Martz' testimony provided the basis for "uncharged collateral crime evidence" to be admitted against Buenoano. Buenoano thus admits that the conviction in Escambia County is not for poisoning but for car bombing. Moreover, there were two collateral crimes victims: Bobby Morris, who died as a result of arsenic poisoning, and John Gentry, who was given

capsules containing paraformaldehyde, who became violently ill and was hospitalized after taking the capsules, who recovered and quit taking the capsules which made him sick, and who was critically injured when his car was bombed. Buenoano's prior convictions, used to support one aggravating factor, included not only her Escambia County for attempted murder of John Gentry by car bombing, but also her prior Santa Rosa conviction for the drowning murder of her invalid son, Michael. Thus, these two prior convictions supported a single aggravating factor. Consequently, even if Martz' testimony in Escambia County were to be seriously questioned, which it is not, the prior violent felony aggravating factor remains undisturbed.

The admission of the Williams Rule evidence, containing the similar incidents of poisoning and insurance claims, did not form the basis for the conviction in Escambia County. Even if you were to accept her allegation of fact -- that Martz somehow could have been impeached at trial -- or that Martz was unworthy of belief, it still would not result in an acquittal for the Orange County murder by arsenic poisoning of Sgt. James Goodyear. Buenoano and her counsel have known what Martz' test results have been for more than a decade. Buenoano affirmatively waived any challenge to the admission of Martz' test results by virtue of the stipulation at trial. Because Martz did not testify at trial, and because his results were admitted via stipulation, and postconviction claim

based on a failure to cross-examine Martz is clearly procedurally barred.

Buenoano's counsel was not denied any right to cross-examine Martz in Orange County; instead, counsel's tactical decision to admit the test results via stipulation constituted an affirmative waiver of cross-examination. Moreover, Martz' test results were merely the underlying foundation for the admission of Dr. Potter's opinion in Escambia County and Dr. Hegert's opinion in Orange County. Even now, Buenoano has not made any allegation that the opinions or either Dr. Potter or Dr. Hegert would have changed or would be any different today. During the Escambia County prosecution, Dr. Potter was called by the State. When Dr. Potter was asked to describe the symptoms a person might experience after ingesting two capsules filled with paraformaldehyde, Dr. Potter explained the symptoms would include pain, nausea, and vomiting; however, a large number of capsules would have to be ingested to cause death. (R. 2814). Furthermore, during the subsequent Orange County trial for the arsenic murder of Sgt. James Goodyear, it was the <u>defense</u> who introduced the stipulated opinion of Dr. Potter.

During the Orange County trial, the State also presented the in court testimony of Dr. Hegert. According to Dr. Hegert, paraformaldehyde is a concentrated form of formaldehyde which usually comes in powdered form; it can be diluted with any solution or fluid, and it is normally used as a disinfectant and cleaning

Solution. Dr. Hegert described paraformaldehyde, agreed it could be toxic if taken in a sufficient quantity of a period of time and could cause death, and, after reviewing the medical records of John Gentry's hospitalization from 12/16/82 through 12/28/82, Dr. Hegert agreed that Gentry's symptoms could be consistent with being caused by paraformaldehyde poisoning. (R. 1020-1022). Moreover, during the defense case in Orange County, Judy Buenoano admitted on direct examination that she was familiar with paraformaldehyde, she studied formaldehyde, and she knew "it would take a lot more than one gram or half a gram to cause death." (R. 1221-1222)

Most revealing, during cross-examination, the following exchange took place,

> [Prosecutor] Didn't you also give paraformaldehyde to John Gentry?
>
> [Buenoano] **Not of my knowledge, I did not.** ***If I did, it was an accident.***
>
> (R. 1248)

During the Orange County trial, defense counsel used Buenoano's admissions in support of his motion for mistrial based on the Gentry testimony, because the "evidence now appears that Mrs. Goodyear would have sufficient knowledge to know that the one half gram of paraformaldehyde given to Mr. Gentry would be insufficient to be fatal . . ." (R. 1406).

Even if CCRC could retry the case and show somehow that Martz was not worthy of belief as to his testing methodology, a procedurally barred claim, all they have is arguable impeachment

against a collateral witness as to one of the two Williams Rule victims. The finder of fact would still get to evaluate the import of the testimony and any impeachment. Any arguable impeachment evidence cited by Buenoano does not establish that Martz ever testified untruthfully in this case.

The OIG report, upon which Buenoano places such great reliance, does not entitle Buenoano to any relief. The OIG Report made findings regarding three units of the FBI Lab's Scientific Analysis Section: the Explosives Unit, the Materials Analysis Unit, and the Chemistry-Toxicology Unit. The OIG Report, which is divided into eight sections, consists of the following divisions: (1) an executive summary; (2) a background section; (3) a detailed discussion of 20 different cases; (4) Whitehurst's allegations of retaliation; (5) recommendations regarding more than two dozen individuals; parts (6) and (7) make various recommendations about the Lab; and (8) the Conclusion. The report found that the OIG investigation "did not substantiate the vast majority of the hundreds of allegations made by Whitehurst. Although the report found deficiencies in work performed in *some* cases, it discredited allegations of perjury and fabricated evidence.

In United States v. Gonzalez, 938 F. Supp. 1199 (D. Del. 1996), affirmed, 127 F.3d 1097 (3d Cir. 1997)[table affirmance], the criminal defendant sought a new trial based on his post-trial assertion that he should be permitted to impeach an ATF explosive

expert's testimony with Frederic Whitehurst's criticisms of the expert's performance in other cases and other areas. The trial court ruled that the defense would not have been allowed to impeach the ATF expert on these issues because they were "extrinsic evidence of specific instances of conduct not germane to [the expert's] truthfulness or untruthfulness." Id. at 1209-1210 (citing Fed. R. Evid. 608(b)). Furthermore, the defense was not entitled to litigate the FBI Lab's performance in other cases. In Gonzalez, the court ruled that FBI documents containing Whitehurst's allegations about one of its chemist's sloppy work environment and failure to follow FBI lab protocol for forensic analysis did not constitute Brady material and would not have been admissible in challenging the weight to be given the expert's scientific findings and conclusions.

Buenoano has not, and cannot, show that the OIG report has any relevance to impeaching the testimony actually offered by the prosecution in Orange County for the arsenic poisoning death of Sgt. James Goodyear. In the absence of any case-specific relevance, the introduction of a 500+ page report, with detailed evaluations of unrelated cases, unavoidably would result in the confusion of the issues and misleading the jury. See, 590.403, Florida Statutes [exclusion of evidence based on grounds of prejudice or confusion].

In Rose v. State, 472 So. 2d 1155 (Fla. 1985), the criminal

defendant complained that his cross-examination was restricted at trial because he was unable to "bring out the level of professionalism" of a police detective for the purpose of determining his credibility. On appeal, this court rejected the defendant's argument, finding that the criminal defendant's attack on the detective's professionalism was not a proper method of attacking credibility under section 90.608.

Moreover, Florida does not allow specific general acts of misconduct to prove character. See 590.609, Florida Statutes; Larzelere v. State, 676 So. 2d 394 (Fla. 1996) [90.609 allows a party to attack the character of a witness only by reputation evidence referring to character related to truthfulness]; Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) ["One impeaches an expert's opinion by the introduction of a contrary opinion based on the same facts," and "It is improper to impeach an expert witness by eliciting from another witness what he thinks of that expert. . . 'A trial should not be turned into a debate on irrelevant and immaterial issues such as the reputation of one expert witness, as determined or judged by the personal opinion of another expert witness for the other side."']

Buenoano has already had two evidentiary hearing in federal court, addressing her claims of ineffective assistance of trial counsel. This Court has repeatedly held that a defendant may not raise claims of ineffective assistance of counsel on a piecemeal

basis. Jones v. State, 591 So.2d 913 (1993); Francis v. Barton, 581 So.2d 583 (Fla.), cert. denied, 501 U.S. 1245, 111 S.Ct. 2879, 115 L.Ed.2d 1045 (1991); Squires v. State, 565 So.2d 318 (Fla. 1990). Similarly, unless a defendant can establish that the basis of a Brady claim could not have been previously discovered, the claim is also barred in a successive motion. Medina v. State, 690 So.2d 1241 (Fla. 1997) (Defendant's Brady claim is barred where the information upon which it is based is not newly discovered). Moreover, as in Jones, Buenoano's current motion was filed beyond the two year time limit of Florida Rule of Criminal Procedure 3.850. Ssaziano v. State, 570 So.2d 289 (Fla. 1990); Lightbourne v. State, 549 So.2d 1364 (Fla. 1989). As Buenoano has failed to show why this claim should not be barred as untimely and successive, she is not entitled to relief.

Assuming, arauendo, Buenoano can overcome the procedural bars, she is not entitled to relief on the merits of either the Brady or the ineffective assistance of counsel claim.

Brady

In order to establish a Brady violation, a defendant must establish the following: (1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that

had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. Hedgwood v. State, 575 So.2d 170, 172 (Fla. 1991), quoting United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989), cert. denied, U.S. ___, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989) (citations omitted). In Haliburton v. Sinaletary, 691 So.2d 466 (Fla. 1997), this Court rejected Haliburton's claim that the state suppressed certain exculpatory evidence in violation of Bradv v. Marvland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Quoting, Cruse v. State, 588 So.2d 983 (Fla. 1991), this Court in Haliburton noted that "not all evidence in the possession of the State must be disclosed to the defense under Brady. Evidence is only required to be disclosed if it is material and exculpatory. Evidence is material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. In making this determination, the evidence must be considered in the context of the entire record. Id. at 987 (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3315, 3383, 87 L.Ed.2d 481 (1985))." Id. at 470. Based on the foregoing, this Court found that Haliburton had not established a Bradv violation where the record showed that all documentation had been turned over, that no evidence was presented to establish that

alleged documents ever existed and that other evidence was equally accessible to defendant.

There is no reasonable probability that "had the evidence been disclosed to the defense, the result of the proceeding would have been different". See, Duest v. Dugger, **555** So.2d 849 (Fla. 1990); citing Medina v. State, **573** So.2d 293 (Fla. 1990). Given the foregoing, Buenoano has not proven a Bradv violation occurred.

In the instant case, there does not exist a reasonable probability that the outcome of the proceedings would have been different. Martz' findings could have been subjected to attack at the trial, but the defense stipulated to the admission of those findings concerning one of the Williams rule victims. No statements or other evidence have been presented which can cause this Court to now conclude that a further proceeding would change the conclusion that Buenoano committed the murder of James Goodyear and that death is the appropriate sentence.

Finalitv

In Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), this Court emphasized,

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting

neither the person convicted nor society as a whole.

Id. at 925.

In addition to the trial court, this Court, the United States District Court, and the Eleventh Circuit Court of Appeals have all recognized that the evidence against Buenoano for the arsenic poisoning murder of Sgt. James Goodyear was substantial. **Nothing** contained in the critique of Roger Martz in any way undermines Buenoano's conviction for the murder by arsenic poisoning of her husband, James Goodyear. There is no credible basis upon which to conclude that the evidence offered by Buenoano will probably lead to an acquittal on retrial. Buenoano is not entitled to an evidentiary hearing and is not entitled to post-conviction relief.

Buenoano also mistakenly asserts that had the Martz information been available to counsel, that counsel could have requested a Frye hearing to challenge the testimony, that the Frve challenge would have been sustained in favor of Ms. Buenoano, and that Martz's testimony would have been excluded as a matter of law. This assertion is a clear misapplication of the relevant case law. merit.

This Court recently addressed this question in Kimbrouuh v. State, 700 So.2d 634, 637 (Fla. 1997), stating:

> [W]hen scientific evidence is to be offered which *is of the same type that has already been received in a substantial number of other Florida cases, any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a*

> *timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed.* Correll v. State, *523* So.2d 562, *567* (Fla.1988); see also Henvard v. State, 689 So.2d 239, *248* (Fla.1996); Washinaton v. State, *653* So.2d 362, *365* (Fla.1994); Robinson v. State, 610 So.2d 1288, 1291 (Fla.1992).

Kimbrough v. State, 700 So.2d 634, 637 (Fla. 1997) (emphasis added)

Despite the oft asserted challenge to *Martz's* "lower threshold of scientific proof than is generally accepted in forensic science" and lack of "appropriate scientific rigor in his approach to examinations," Buenoano has simply failed to present any support for the proposition that the general scientific methods employed, infrared analysis, x-ray analysis, and mass spectrometry analysis, do not enjoy " *general scientific acceptance.* " Kimbrouuh v. State, *700* So.2d at 637. The question of Martz's employment of those methods is credibility issue that is subject to challenge on direct examination. Murray v. State, 692 So.2d 157, 161 (Fla. 1997) It does not serve to exclude the testimony. Therefore, a Frve hearing would have been inappropriate had it been requested.

It was *not requested,* however. To the contrary, this evidence was admitted by stipulation and was limited to the fact that the [Vicon-C] capsules were forwarded to the FBI laboratory in Washington, DC and examined by chemist Roger Martz and that Martz determined that the capsules contained paraformaldehyde. (R 102) Clearly, this was a tactical decision by defense counsel to limit

the impact of Martz' testimony. In any case, there was no objection to the admission of this testimony. Accordingly, this claim is procedurally barred. Hadden v. State, 690 So.2d 573 (Fla. 1997). Buenoano cannot excuse this bar by simply asserting that counsel was ineffective for failing to raise the claim. Robinson v. State, 23 Fla. Law Weekly S85, S88-89 (Fla. February 12, 1998); Johnson v. State, 695 So. 2d 263, 265 (Fla. 1996).

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING POSTCONVICTION RELIEF AND FINDING THAT BUENOANO HAS ESTABLISHED NO BASIS TO AMEND HER THIRD RULE 3.850 MOTION BASED ON INVESTIGATIONS CONCERNING THE FBI CRIME LAB.

In denying relief on this claim (set forth as issue II in Buenoano's postconviction motion), the trial court concluded, in pertinent part,

[Issue II, postconviction motion]

> In this claim, Buenoano argues she should be granted a stay of execution so that she may receive the remainder of the Federal Bureau of Investigation (FBI) documents pertaining to FBI Examiner Roger Martz and thereafter investigate and develop any potential claims she may have with regard to these documents.
>
> With regard to Buenoano's assertion that she was prevented from "referring in [her rule 3.850 motion] or in open court to several pages of documents because the State's appeal of this Court's denial of a protective order [was at the time she prepared her motion] undecided," the Court notes that only **ten** of the multitude of documents pertaining to FBI Examiner Roger Martz were under seal and that Buenoano was not prohibited in any way whatsoever from referring to the remainder of the documents.
>
> The investigation at the FBI Laboratory that Buenoano referred to in her rule 3.850 motion resulted in the preparation and April 1997 release of a document entitled *"The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (hereinafter referred to as *'FBI Investigation Report')."* The allegations which caused the investigation to take place were brought to the Office of the Inspector General's (OIG) attention by Supervisory Special Agent Frederic Whitehurst, a Ph.D. scientist employed in the FBI Laboratory. *FBI Investigation Report, 1.* During the course of conducting its investigation, the OIG also investigated problems

that it identified itself, as well as information brought to its attention by other employees in the Laboratory. Id.

The investigation spanned more than eighteen months and addressed a very large number of allegations. Id. Most of the hundreds of allegations made by Whitehurst were not substantiated; some important ones were. Id. at 1-2. Some of the allegations pertained to FBI Examiner Roger Martz.

Roger Martz became an examiner in the Chemistry-Toxicology Unit (CTU) of the FBI in 1980 and has been the chief of the CTU since July 1989. Id. at 445. The allegations regarding Roger Martz resulted in the OIG concluding that:

> Roger Martz lacks the credibility and judgment that are essential for a unit chief, particularly one who should be substantively evaluating a range of forensic disciplines. We found Martz lacking in credibility because, in matters we have discussed above, he failed to perform adequate analyses to support his conclusions and he did not accurately or persuasively describe his work. We recommend that Martz not hold a supervisory position. The Laboratory should evaluate whether he should continue to serve as an examiner or whether he would better serve the FBI in a position outside the Laboratory. If Martz continues to work as an examiner, we suggest that he be supervised by a scientist qualified to review his work substantively and that he be counseled on the importance of testifying directly, clearly and objectively, on the role of protocols in the Laboratory's forensics work, and on the need for adequate case documentation. Finally, we recommend that another qualified examiner review any analytical work by Martz that is to be used as a basis for future testimony.

Id. at 448.

Although Roger Martz did testify in the case arising out of Escambia County which resulted in the State obtaining a conviction against Buenoano for the attempted

murder of John Gentry, Roger Martz did not testify in this case (the case which resulted in the State obtaining a conviction against Buenoano for the murder of James Goodyear). Martz's involvement in this case was merely the fact that he was mentioned in a stipulation that was placed into the record at the trial of this matter. Said stipulation provided as follows:

> [i]t's been stipulated by the State and the defense that the pills that Mr. Gentry testified to were retrieved by Detectives Chamberlain and Steele of the Pensacola Police Department, that those pills were taken into evidence by Officer Gwendolyn Pate, that she then in turn transmitted those pills to the Florida Department of Law Enforcement, where they were analyzed by a chemist by the name of Marion Estees.
>
> Mr. Estees determined, one, that the container of the capsules were Vicon C type capsules, two, that Mr. Estees was unable to determine the contents of the capsules.
>
> Those capsules were subsequently forwarded to the Federal Bureau of Investigation's laboratory in Washington, D.C., and examined by a chemist by the name of Roger Markz [sic] of the FBI. Mr. Martz [sic] determined that the capsules were Vicon C, and that the substance contained inside of those capsules was paraformaldehyde, Class III poison.
>
> It's been further stipulated by the State and the defense that search warrants were executed by the police, Pensacola Police Department, on the home and business of the defendant in July of 1983, in Pensacola, Florida, that as a result of the execution of that search warrant of her home there was no paraformaldehyde found, nor any arsenic.
>
> That as a result of the execution of the search warrant at her business, Fingers and Faces, there was no paraformaldehyde found there, nor was there any arsenic found there.

(Record on Direct Appeal following conviction

(hereinafter 'R'), pages 1012-1013.)

This Court obviously has no knowledge of the bases upon which counsel for Buenoano and counsel for the State agreed to enter into the stipulation quoted above. However, that matter is irrelevant. Buenoano willingly agreed to enter into evidence a statement that Roger Martz examined the pills in the Gentry case, and that he concluded that those pills contained paraformaldehyde. Buenoano has not alleged that she was in any way prohibited from testing the pills, and if she contested Martz's finding that the pills contained paraformaldehyde, she could have conducted her own examination of said pills back at the time when she was on trial in Escambia County for the attempted murder of John Gentry.

Any claim that Buenoano received ineffective assistance of trial counsel because said stipulation was entered into evidence is procedurally barred because Buenoano has raised claims of ineffective assistance of trial counsel in a prior rule 3.850 motion. See Buenoano v. Dugger, 559 so. 2d 116 (Fla. 1990). It is well established that ineffective assistance of counsel claims cannot be raised on a piecemeal basis. See Pose v. State, 702 So. 2d 221 (Fla. 1997).

Any claim predicated upon the FBI documents pertaining to Roger Martz would be a claim based upon either newly discovered evidence or Brady evidence. n order to prevail on a claim of newly discovered evidence, the asserted facts must have been unknown by the trial court , by the party, or by counsel at the time of trial, it must appear that the defendant or his counsel could not have known them by the use of due diligence, and the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911 (Fla. 1991).

It is undisputed that prior to April 1997, the facts regarding the problems associated with Roger Martz's work on FBI cases were not known by the trial court, Buenoano, or counsel for either the State or Buenoano. In fact, most of the cases in which he apparently erred had not yet even occurred at the time of Buenoano's trial. Furthermore, it is clear that at the time of trial, said facts regarding the problems associated with his work could not have been known by Buenoano by the use of due

diligence. Therefore, for purposes of determining whether Buenoano could prevail on a claim of newly discovered evidence, the issue becomes whether this evidence is "of such a nature that it would probably produce an acquittal on retrial." Id.

Evidence that there were problems with Roger Martz's work on cases most likely would have had some sort of impact on the evidence that the State presented with regard to the Gentry attempted murder. However, this evidence at most would have provided impeachment evidence, and based upon the evidence that the State presented at trial, which is referred to below, there is no responsible probability that this evidence would produce an acquittal on retrial.

Moreover, even if none of the testimony or evidence regarding the Gentry case had been presented at trial, there was still significant evidence presented by the State to support Buenoano's guilt. Specifically, the State presented the testimony of Dr. R.C. Auchenbach and Dr. Leonard Bednarczyk, who both testified that they believed Mr. Goodyear's death was related to arsenic poisoning. (R. 233-333, specifically 264-267; R. 334-396, specifically 347-349).

Additionally, the State presented the testimony of Ms. Constance Lang. (R. 459-499.) Ms. Lang's testimony included statements that she and Buenoano became "as close as sister" (R. 461) and that Buenoano would "joke" with her about how they could solve their problems with their husbands by poisoning them with arsenic. (R. 463, 470, 480-486, 495-499).

The State also presented the testimony of Ms. Debra Sims. (R. 567-583.) Ms. Sims testified that Buenoano hesitated to take Goodyear to the hospital after he exhibited signs of illness. (R. 571-573, 575-578.)

Further, the State presented the testimony of Ms. Mary Beverly Owens. (R. 655-690.) Ms. Owens testified that Buenoano informed her that she could kill her husband with fly or some other type of insect poison and that there was "no way they could ever find out, because the autopsy won't show up unless they are really looking for that." (R. 660-664, 666-665, 686-688.) Further, Ms. Owens testified that Buenoano confessed to her that she had killed James Goodyear with arsenic. (R. 661, 674-

679, 688, 690.)

Moreover, the State presented the testimony of Lodell Morris. (R. 695-733.) Mr. Morris also testified that Buenoano told him she had killed her husband, James Goodyear. (R. 697-698, 715.) Furthermore, Mr. Morris testified as to how his son, Bobby Joe Morris, who had been living with Buenoano, died after exhibiting symptoms which were similar to the symptoms which Mr. Goodyear suffered from before his death. (R. 710.)

The State also presented testimony regarding the insurance policies that Buenoano had taken out on James Goodyear and Bobby Joe Morris. (R. 420-439; 719-733; 734-742; 743-748; 749-754.) Additionally, the State presented evidence that the death of Bobby Joe Morris was also the result of acute arsenic poisoning. (R. 756-789; 836-854; 857-867; 868-912; 919-947.) In light of all of this evidence, there is no way that the introduction of evidence regarding Martz's errors at the FBI Laboratory "would probably produce an acquittal on retrial." Id.

The test for determining the effect of the State's failure to disclose exculpatory evidence in violation of Bradv v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), is whether there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. United States v. Baalev, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985). The evidence concerning Roger Martz's errors at the FBI Laboratory constitutes, at most, impeachment evidence in light of the fact that Buenoano does not have any basis to assert that the conclusions he reached regarding the Vicon C capsules were erroneous. However, assuming arguendo that the Martz evidence constitutes exculpatory Brady evidence in this case, based upon all of the evidence specifically referred to above, there is no reasonable probability that the result of the proceeding would have been different had the evidence regarding Martz's problems at the FBI Laboratory been disclosed to the defense.

With regard to Buenoano's assertion that State agencies have obstructed the OIG's investigation of Roger Martz's work on the Buenoano cases, and that the State misled the OIG with regard to the role that Martz played

in Buenoano's trials and convictions, the Court finds that the *FBI Investigation Report* was issued before the allegedly obstructive and deceptive practices of the State agencies. Furthermore, after apparently receiving correspondence from Buenoano's counsel regarding Martz's involvement in Buenoano's cases, the FBI sent a letter dated February 25, 1998 to Buenoano's counsel that states:

> We are in receipt of your letter, dated February 20, 1998, requesting permission to interview Frederic Whitehurst regarding any alleged role of the FBI Supervisory Agent (SSA) Roger Martz in the convictions obtained by the State of Florida against your client, Judy Buenoano. We hereby deny that request since we have determined that any such role that SSA might have played in your client's convictions was, at most, both collateral and remote.
>
> Upon investigation of SSA Martz's alleged role in the convictions against your client, we have determined that SSA Martz performed an analysis in an investigation that did not result in a charged crime. His analysis was only included, among other analyses, in testimony that was submitted into evidence as collateral crimes evidence by the prosecution. It is our understanding that SSA Martz did not testify in the trial of the charge for which Ms. Buenoano faces the death penalty. The crucial forensic evidence in the capital case appears to have been given by forensic toxicologist, Dr. Leonard Bednarczyk and the Orange County Medical Examiner, Dr. Thomas Hegert. Moreover, the poisoning case for which SSA Martz performed the analysis was not investigated by the Department of Justice Inspector General, and all findings concerning SSA Martz's performance in the laboratory were made public in his Report on the FBI Laboratory almost a year ago.
>
> For all these reasons, we deny your request to interview Frederic Whitehurst concerning this matter.

> (emphasis in original). Thus, despite the fact that the OIG examined problems and cases that were pointed out to it by Whitehurst and problems that it discovered on its own during the course of its investigation, apparently nothing alerted the OIG to any errors with regard to Martz's work in the Buenoano Escambia County case. Since the extensive investigation was conducted and the report was issued before the alleged misconduct of the State agencies, this Court finds that Buenoano's claim that the State agencies have obstructed the OIG's investigation of Roger Martz's work on the Buenoano cases, and that the State misled the OIG with regard to the role that Martz played in Buenoano's trials and convictions does not provide a basis for relief.
>
> Based upon the foregoing, this Court finds that Buenoano is not entitled to relief on Claim II of her rule 3.850 motion.

The trial court's well-reasoned, comprehensive denial of postconviction relief on this issue must be affirmed. The U.S. Department of Justice has not been misled for purposes of making any critical decision regarding whether Roger Martz' testimony was presented during the Escambia County trial involving bombing victim John Gentry or regarding the collateral crime evidence presented in the Orange County death penalty prosecution.

In April of 1997, the Office of the Inspector General [OIG] released its report to the public regarding its investigation of the FBI laboratory, including Roger Martz. Buenoano's cases, which occurred in 1984 and 1985, were not discussed anywhere in the OIG report. In fact, FBI Agent Whitehurst did not begin working in the FBI Laboratory until 1986. [OIE Report at 2]

During the summer after the release of the OIG report,

Assistant State Attorney John Spencer, relying on the erroneous recollection of the former state prosecutor, incorrectly advised the FBI Task Force that Roger Martz was not called as a witness. However, Roger Martz did testify as a witness during the Escambia trial involving car-bombing victim John Gentry. Martz' testimony related solely to the paraformaldehyde contents of the capsules given to Gentry by Buenoano. The FBI Task Force was not misled by the Escambia County prosecutor's correspondence in the summer of 1997 because (1) the FBI Task Force knew Martz had testified in Escambia County, (2) the FBI Task Force had a copy of Martz' testimony in the Escambia case, (3) the FBI Task Force sent a copy of Martz' testimony in the Escambia case to the prosecutor, and (4) the Escambia prosecutor immediately corrected his error in a subsequent letter to the FBI Task Force.

On February 25, 1998, Deputy General Counsel for the U.S. Department of Justice, Federal Bureau of Investigation, notified CCRC that it was denying CCRC's request to interview Frederick Whitehurst regarding any alleged role of FBI Supervisory Special Agent (SSA) Roger Martz. The letter from the Justice Department states in pertinent part:

> "His [Martz] analysis was only included, among other analyses, in testimony that was submitted into evidence as collateral crimes evidence by the prosecution. It is our understanding that SSA Martz did not testify in the trial of the charge for which Ms. Buenoano faces the death penalty. The crucial forensic evidence in the capital case appears

> to have been given by forensic toxicologist, Dr. Leonard Bednarczyk and the Orange County Medical Examiner, Dr. Thomas Hegert. Moreover, the poisoning case for which SSA Martz performed the analysis was not investigated by the Department of Justice Inspector General and all findings concerning SSA Martz' performance in the FBI Laboratory were made public in his report on the FBI Laboratory almost a year ago.

Martz' conclusion, that the capsules given to Gentry by Buenoano contained paraformaldehyde, was presented to the Orange County jury via stipulation. Moreover, during the defense case in Orange County, in response to the Williams rule evidence, Buenoano presented the stipulated testimony of Dr. Potter, a pathologist who obtained the capsule from the Pensacola Police Department.

The U.S. Department of Justice has not been misled for purposes of making any critical decision regarding whether Roger Martz' testimony was presented during the Escambia County trial involving bombing victim John Gentry or regarding the collateral crime evidence presented in the Orange County death penalty prosecution. Buenoano has not, and cannot, establish that she is entitled to any relief based on Frederic Whitehurst's subsequent criticisms of Martz in unrelated cases. For the following reasons, Buenoano's criticisms of Martz are unavailing.

Drowninu murder of Michael Goodyear

Santa Rosa County:

Roger Martz had **NOTHING** to do with the drowning murder investigation of Michael Goodyear. His testimony was never

introduced during the Santa Rosa trial. Buenoano was indicted on January 11, 1994, by the Santa Rosa County Grand Jury for the first degree murder of her paralyzed son Michael Goodyear, by drowning him and grand theft of more than $20,000 from Prudential Life Insurance. (Santa Rosa Record R 2176).

Michael was murdered on May 13, 1980. The jury returned its verdict on April 2, 1984. (SR 2198-2199). Buenoano applied for a $20,000 life insurance policy on Michael on October 8, 1979 (SR 737). Buenoano reinstated childhood policies on Michael on April 5, 1980 (SR 734). Michael Goodyear's forged signatures appeared on the policies (SR 901). On May 12, 1980, Buenoano drove to Tampa to bring her paralyzed son, Michael Goodyear, home from the VA hospital. The next day, May 13, 1980, Buenoano took Michael (who was 5'10" and weighed only 120 pounds, whose arms and legs were shrinking away and who was weighted down with braces on his paralytic, degenerative legs), on a canoe trip. Michael drowned in the river. When Michael's body was recovered from the bottom of the river, he was not wearing a life jacket or ski belt. When a fisherman who happened upon Buenoano, she told him "there's no use going back because the boy was already gone." (SR 138). She also chose to drink a beer on the shore before calling the rescue team. (SR 143).

Colorado arsenic poisoning of Bobby Joe Morris

Roger Martz had **nothing** to do with the investigation of the

arsenic poisoning death of Bobby Joe Morris. Independent evidence was presented at trial that Bobby Joe Morris, with whom Buenoano lived after Goodyear's death, became ill and died after exhibiting the same symptoms of vomiting, nausea, fever and hallucinating that Goodyear exhibited before his death. When Morris' remains were exhumed in 1984, the tissue analysis revealed acute arsenic poisoning. Once again, Buenoano, who represented herself as Morris' wife, was the beneficiary on multiple life insurance policies.

Escambia County attempted murder of John Gentry:

On March 30, 1984, an information was filed in the circuit court in and for Escambia County charging Buenoano with the attempted murder of John Gentry by placing, or causing to be placed, an explosive device in his car. On June 25, 1983, when John Gentry, who had parked his car in a Location directed by Buenoano and who left the restaurant alone, again at Buenoano's direction, started his car and turned on the lights, the car bomb exploded. EC307; 308. During the Escambia County trial, Gentry testified that he started getting violently ill around November and December of 1982. EC301. Gentry had to be hospitalized. According to Gentry, Buenoano suggested he take Vicon-C tablets when he came down with a cold and she gave him two of these a day. EC302. Gentry was hospitalized for two weeks in December and during his hospitalization he improved almost immediately. EC302.

When he returned to Buenoano's home she began giving him the capsules again and he once again became ill. After about a week, Gentry quit taking the pills altogether. However, he saved two of the pills to have them analyzed to see if he was having a reaction to anything in the capsules. Gentry wrapped two pills in a cigarette cellophane and placed them in his briefcase. EC303.

These capsules which Gentry saved were eventually forwarded to the FBI Laboratory and Roger Martz, who examined the capsules and found the capsules contained paraformaldehyde. Dr. James Potter, a pathologist, testified at trial that paraformaldehyde, if ingested by a human, would irritate and damage the membranes or any tissues. Dr. Potter also concluded that it would take a large number of capsules the size of capsules Gentry had taken in order to cause death. EC45

Oranae County murder by arsenic woisonina of James Goodvear

Roger Martz had **NOTHING** to do with the investigation of the murder by arsenic poisoning of Sgt. James Goodyear.

Roger Martz' role in the arsenic poisoning trial of victim James Goodyear was limited to a stipulation introduced during the State's case regarding a Williams rule victim, John Gentry. During the Orange County case, the defense also relied on the stipulated testimony of witness Dr. Potter.

The Orange County prosecution for the arsenic poisoning of James Goodyear relied on two Williams rule victims, Bobby Morris,

who died as a result of arsenic poisoning and John Gentry who was given paraformaldehyde capsules provided by Buenoano. When Gentry refused to take any more of the pills which made him violently ill, his car was bombed.

Buenoano's challenge to the testimony of Roger Martz in this case closely resembles the post-conviction complaints lodged in Correll v. State, 698 So. 2d 522 (Fla. 1997). In Correll, the defendant filed a rule 3.850 motion, asserting newly discovered evidence and violations of chapter 119, Florida Statutes (1993). The motion alleged that Correll had recently discovered that Judith Bunker, the State's expert witness on blood splatters, had misrepresented her educational background and experience. The motion also alleged that various agencies had failed to comply with Correll's request for public documents related to whether or not these agencies had actually consulted with Bunker in her capacity as an expert in blood stain analysis. The trial judge, who presided at Correll's trial, summarily denied relief. Correll then filed a motion to disqualify the trial judge on the grounds that the judge had relied on personal knowledge in denying Correll's claims and that the judge was biased against Correll's counsel. This motion was also denied. Correll appealed the denial of his rule 3.850 motion and the motion to disqualify. In affirming the denial of postconviction relief, this Court explained:

> We agree with the trial court that the evidence proffered by Correll does not qualify as newly discovered evidence because it

was discoverable at the time of trial. However, even if the evidence was not discoverable at the time of trial, the discrepancies between the level of education, training, and experience Bunker testified to at trial and the asserted level of education, training, and experience she actually had were not so great as to make any difference in the outcome of the case. Moreover, Bunker's vita, which among other things, falsely set forth that Bunker had a high school diploma, was never seen by the jury. Thus, any misrepresentations contained in the vita are irrelevant to Correll's claim.

The only alleged misrepresentation of any import was Bunker's assertion that she had worked as an assistant and technical specialist for the medical examiner's office from 1970 through 1982, when in reality she was a secretary at the medical examiner's office from 1970 to 1974, an assistant to the medical examiner from 1974 to 1981, and a technical specialist for the last five months of her employment with the medical examiner's office. In view of the fact that it is undisputed that she worked on thousands of cases while in the employ of the medical examiner, even this discrepancy becomes less serious.

However, assuming for the sake of argument that Bunker's testimony did contain serious discrepancies that could not have been discovered during trial, we are convinced that these discrepancies did not have any impact on the outcome of the case in light of the overwhelming evidence presented at trial in support of Correll's guilt. Moreover, Bunker's testimony was not crucial to the State's case and merely corroborated the medical examiner's testimony. Correll's argument that Bunker's testimony greatly affected the outcome of the case because it was the only evidence presented in support of the State's "single-killer" theory is meritless because there was overwhelming evidence of Correll's guilt regardless of whether other perpetrators were involved in the murders.

All of Correll's public records requests went to the issue of whether various agencies had consulted with Bunker as an expert witness. The requests were therefore directly related to his newly discovered evidence claim. Because the trial court determined that Correll's newly discovered evidence claim was without merit, the trial court's summary denial of Correll's related public records claim was proper.

Buenoano alleges ineffective assistance of her current collateral counsel as a basis for relief. Claims of ineffective

assistance of postconviction counsel do not present a valid basis for relief. See Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996), citing Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)(the Sixth Amendment right to appointed counsel extends to the first appeal as a matter of right and no further).

On April 9, 1997, Buenoano requested information from the Department of Justice concerning their impending publication of the FBI Lab investigation and analyst Roger Martz. One week later the reports became public and were released to everyone, including Buenoano. The dates of Spencer's letters, June and August of 1997, had no impact whatsoever on what was contained in the OIG report.

Buenoano also relies on a excerpt of the OIG report concerning "materials discussed **above**". The OIG's findings with regard to other cases which occurred years after Buenoano's trial are of no benefit to her. At best, Buenoano has arguable impeachment evidence but this impeachment was not material to Buenoano's guilt or conviction. Buenoano has never alleged that Martz was unable to recognize paraformaldehyde. Buenoano paints Martz as a villain without recognizing that the tests he conducted and the results he reached could have been but were not challenged at trial. This underlying claim is procedurally barred. Buenoano criticizes the speed with which the FBI material was provided to Buenoano.

However, the prosecutor only received the FBI materials in December of 1997 and it was the prosecutor who brought the FBI materials to the attention of this Court and Buenoano with regard to a Brady in camera request.

Because the FBI investigation into the FBI Lab was concluded before the Spencer letters, Buenoano cannot possibly attribute any statement by the prosecutors as causing the FBI Lab Task Force not to conduct an investigation into Buenoano.

ISSUE IV

WHETHER BUENOANO HAS BEEN DENIED ANY RIGHTS UNDER FLORIDA'S PUBLIC RECORDS LAW.

Buenoano next challenges the trial court's summary denial of her public records claim as a basis for postconviction relief. Buenoano asserts that various state agencies have failed to comply with Chapter 119, Florida Statutes, and that she should not have been forced to file an amended 3.850 motion until she was satisfied that there has been full compliance with Florida's public records law. However, a review of the record fails to establish any reason to prolong this matter for further public records litigation. The conclusory allegations included in this claim are procedurally barred and without merit.

The allegation that Buenoano had been denied access to public records was initially presented to the court below in Motions to Compel filed in February, 1998 (R. 887). Following a hearing to determine the status of public records requests and an in camera review of the documents that various agencies had withheld as exempt from Chapter 119 in responding to the requests, the trial court issued a comprehensive Order on March 11, 1998 (R. 887-904). The court concluded that most of the documents were properly withheld as exempt from disclosure, but ordered that some medical records and redacted copies of documents containing confidential victim or juvenile information be provided to Buenoano (R. 887-903). All sealed documents which have not been disclosed are now

before this Court, and this Court can certainly determine the legitimacy of the statutory exemptions claimed by the state and upheld by the judge below.

Although the court below continues to attempt to assist Buenoano in her search for public records, the judge properly denied the asserted lack of disclosure from the fifteen listed agencies as a basis for granting relief from Buenoano's pending execution. The court determined that, with due diligence, counsel for Buenoano could have obtained these records long ago; therefore, her failure to do so offered no basis for consideration of this claim in her **third** motion for postconviction relief.

The trial court's rejection of this claim as procedurally barred is well supported by the facts and the applicable law. Buenoano's conviction and sentence became final nearly a decade ago, in 1988. Most of the public records which she is complaining having not been disclosed were not requested until January, 1998; the earliest requests were made in January, 1997, but allegations of noncompliance were not presented to the trial court until the filing of the motions to compel in February, 1998. This Court has consistently acknowledged that capital defendants must use due diligence in seeking information contained in public records for timely presentation in postconviction claims. Where pertinent information was available, but was not sought in time to be used in the initial postconviction proceeding, any underlying claim is

necessarily barred from a successive motion. Steinhorst v. State, 695 So.2d 1245, 1247-49 (Fla. 1997); Porter v. State, 653 So.2d 374, 378 (Fla. 1995); Zeigler v. State, 632 So.2d 48, 50 (Fla. 1993); Aaan v. State, 560 So.2d 222, 223 (Fla. 1990); Demps v. State, 515 So.2d 196, 198 (Fla. 1987). Any information which might be obtained from any disclosure at this point could not form the basis of a cognizable claim. Thus, the trial court properly rejected this claim summarily, and the fact that the court proceeded with a Huff hearing and consideration of the amended 3.850 motion as filed before ruling on the motions to compel is insignificant,

A review of Buenoano's specific claim confirms that no relief is warranted on this issue. Buenoano contends that fifteen state agencies have failed to comply with her requests for public records:

1) Orange County State Attorney's Office;
2) Orange County Sheriff's Department;
3) Florida Department of Law Enforcement;
4) Orange County Medical Examiner;
5) Broward County Medical Examiner;
6) Metro-Dade County Medical Examiner;
7) Dr. Leonard Bednarczyk;
8) Escambia County State Attorney;
9) Pensacola Police Department;
10) Escambia County Sheriff's Department;
11) Santa Rosa County Sheriff's Department;
12) Santa Rosa County State Attorney;
13) Okaloosa County Medical Examiner;
14) Escambia County Medical Examiner; and
15) The Florida Bar.

Of these agencies, only three agencies are within the circuit

court's jurisdiction, Records compliance by law enforcement agencies, medical examiners, and state attorneys in Broward, Metro-Dade, Escambia, Santa Rosa, and Okaloosa counties was beyond the scope of the postconviction motion filed below and cannot be used as a basis for further delay. Jackson v. Dugger, 633 So.2d 1051, 1054 (Fla. 1993) ("In this instance, the records requested were not in the hands of the state attorney and, consequently, seeking those records in a rule 3.850 proceeding is improper"); Hoffman v. State, 613 So.2d 504, 506 (Fla. 1992) (access to records of state agencies outside the judicial circuit in which the case was tried and those within the circuit that have no connection with the state attorney must be pursued under the procedures outlined in chapter 119).

As to records maintained by the Orange County State Attorney, Sheriff, and Medical Examiner, the trial judge conducted a hearing on Buenoano's motions to compel disclosure from these and other agencies on March 6, 1998. Following the hearing, the judge specifically ruled that the Orange County State Attorney's Office and the Orange County Sheriff's Office have "fully complied with all of Buenoano's public records requests that have been brought to the attention of this Court as of this date" (R. Order pp. 6, 7, 13). As to the Orange County Medical Examiner, the judge ruled that the medical records pertaining to James Goodyear were statutorily exempt, however, the exemption did not apply to

Buenoano because, as Goodyear's wife, she was statutorily entitled to the medical records of her deceased husband. Thus, the judge ordered disclosure of these records.

None of the authorities cited by Buenoano support her suggestion that due process requires a stay of execution and additional time to file an amended postconviction motion. The court below expressly acknowledged the cases she cites where this Court has remanded postconviction cases for resolution of Chapter 119 issues; the court below expressly distinguished these cases, since they all pertained to the filing of a defendant's **initial** postconviction motion. In contrast, this Court has declined to halt executions or remand for further public records litigation when a defendant offers conclusory allegations of noncompliance as a basis for relief during an active death warrant and/or successive postconviction litigation. See, Correll v. State, 698 So.2d 522, 524 (Fla. 1997); White v. State, 664 So.2d 242 (Fla. 1995); Atkins v. State, 663 So.2d 624 (Fla. 1995); Porter, 653 So.2d at 378.

Buenoano criticizes the trial judge for remarking that she had failed to specify any particular document that she believes to exist which has not been disclosed to her, noting that she only had 23-1/2 hours to file her motion. However, she has been engaged in public records litigation for over a year, and although she had more than 23-1/2 hours to draft her brief in this appeal, she still has not specifically identified a particular document which has not

been disclosed. Similarly, she criticizes the trial judge for remarking that he could not fathom how the Florida Bar played any role in her conviction, claiming that he made this finding without giving her the opportunity to be heard, yet she has not indicated what information she would relay on this issue if she were granted the opportunity to be heard.[4] Her conclusory allegations merely illustrate the insufficiency of her pleadings.

On the facts of this case, no violation of Chapter 119 or this Court's case law concerning capital defendants' rights to public records has been demonstrated. No relief is warranted on this claim.

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[4] In 1989 Buenoano filed a petition before this Court seeking records regarding her trial attorney, James Johnston, from the Florida Bar. See, Judias Buenoano v. Florida Bar, Case No. 68,091.

ISSUE V

BUENOANO'S UNCHALLENGED PRIOR CONVICTIONS IN SANTA ROSA COUNTY AND ESCAMBIA COUNTY DO NOT CONSTITUTE A BASIS FOR COLLATERAL RELIEF IN THIS THIRD SUCCESSIVE RULE 3.850 MOTION.

Buenoano next asserts that the trial court erred in summarily denying her claim that the presentation of an unconstitutionally obtained conviction, i.e., the Escambia County conviction for the attempted murder of John Gentry, "deprived [her] of a fair and reliable trial and capital sentencing determination." Buenoano claims that she "can plead facts which, if true, entitle her to relief from her Escambia County conviction" and, therefore, the trial court should have granted her an evidentiary hearing to establish said facts. It is the state's position that Buenoano has not presented an appropriate basis to obtain relief from the death sentence which was imposed upon her in this case. Neither the circuit court, nor this Court, can review the legality of the collateral and presumed valid prior conviction that Buenoano received in Escambia County. Calloway v. State, 699 So. 2d 849 (Fla. 3d DCA 1997); Bush v. State, 682 So. 2d 85 (Fla. 1996).

Buenoano's Santa Rosa County conviction for the first degree murder of her invalid son, Michael, was affirmed by the First District Court in 1985. Buenoano v. State, 478 So. 2d 387 (Fla. 1st DCA 1985), jurisdiction improvidently granted, petition for review dismissed, Buenoano v. State, 504 So. 2d 762 (Fla. 1987). The validity of this conviction has not been challenged and is not

an issue in this case. Buenoano's Escambia County conviction for the attempted murder of car-bombing victim John Gentry, however, is at issue in the instant case. This conviction was affirmed by the First District Court in 1986. Buenoano v. State, 484 So. 2d 11 (Fla. 1st DCA 1986), cause dismissed, 488 So. 2d 829 (Fla. 1986). It is the Escambia case in which Roger Martz testified concerning the Vicon-C capsules which were found to contain paraformaldehyde. (R. 2770). This conviction has never been challenged, let alone set aside and is, therefore, still valid.

On April 5, 1990, almost eight years ago, this Court declined to reach Buenoano's post-conviction claim that her death sentence was unconstitutional because her prior convictions used in aggravation allegedly were obtained unconstitutionally. This Court found, and Buenoano conceded, that this issue was not ripe for review. No challenge had been filed and no basis for a challenge had been asserted. Buenoano v. Dugger, 559 So. 2d 1116, 1120 (Fla. 1990).

Now, twelve years after her Escambia County conviction was affirmed on direct appeal, and eight years after she abandoned this claim in her post-conviction appeal from Orange County, Buenoano again, disputes the validity of her prior conviction. She now claims that due to the testimony of FBI examiner Roger Martz in establishing the content of the Vicon-C tablets, the presentation of the prior conviction as an aggravating factor in the instant

case, deprived her of a fair and reliable trial and capital sentencing determination.

The circuit court reviewed this claim and stated:

> In this claim, Buenoano asserts that the presentation of an unconstitutionally obtained conviction, i.e., the Escambia County conviction for the attempted murder of John Gentry, "deprived [her] of a fair and reliable trial and capital sentencing determination." Buenoano's claim that she "can plead facts which, if true, entitle her to relief from her Escambia County conviction" does not provide her with a basis to obtain relief from the death sentence which was imposed upon her in this case. Neither this court, nor the Florida Supreme Court, can review the legality of the conviction that Buenoano received in Escambia County. Calloway v. State, 699 So. 2d 849 (Fla. 3d DCA 1997); Bush v. State, 682 so. 2d 85 (Fla. 1996). If Buenoano wishes to pursue postconviction relief with regard to the Escambia County conviction, she should do so; this Court certainly is not hampering her efforts.
>
> Furthermore, in her argument, Buenoano completely ignores that fact that at the penalty phase of the proceedings, the State also presented evidence of her conviction from Santa Rosa County for the first degree murder of her son, a conviction for which she is serving a sentence of life imprisonment. Therefore, even if the Escambia County conviction for the attempted murder of John Gentry had not been presented, the State presented evidence of another murder that Buenoano was convicted of.
>
> Therefore, there was still another murder conviction as an aggravating circumstance to support the imposition of the death penalty in this case.
>
> Based upon the foregoing, the Court finds that Buenoano is not entitled to relief on Claim IV of her rule 3.850 motion.

As the trial court found, neither the circuit court nor this Court has jurisdiction to set aside a prior conviction which was affirmed by the District Court of Appeal and which was used to establish the prior violent felony aggravating factors. See, Bush v. State, 682 So. 2d 85 (Fla. 1996); Roberts v. State, 678 So. 2d 1232 (Fla. 1996); Eutzv v. State, 541 So. 2d 1143, 1146 (Fla. 1989)(Death row inmate not entitled to post-conviction relief due to pendency of collateral proceedings to vacate prior conviction in another jurisdiction.)

Further, it should be noted that the conviction in Escambia County was for the attempted murder of John Gentry by car-bombing, not poisoning. (R 1519) Accordingly, any impeachment evidence about the content of the capsules, would still leave intact the fact that Buenoano bombed Gentry's car and that he became ill after ingesting the pills that she insisted he take. In light of this evidence, Buenoano would be unable to satisfy the newly discovered evidence standard. Correll v. State, 698 So. 2d 522 (Fla. 1997).

Moreover, even if the now-challenged testimony of Roger Martz in the Gentry case were to form the basis for an out-of-time, successful challenge to the Escambia County conviction, a point which the State specifically denies, Buenoano still has an additional prior murder conviction for her son, Michael, in Santa Rosa County. During the penalty phase of Buenoano's trial, Santa Rosa County prosecutor, Russell Edgar testified concerning the

facts of Buenoano's conviction for the drowning death of her son, Michael. (R 1556) Michael was paralyzed from the elbows to the fingertips and from his knees to his toes and was wearing fifteen pounds of braces. Edgar testified that the defendant, Judy Buenoano and her other son James, took the handicapped Michael out in a canoe. He was placed in a folding chair and seated in the middle of the canoe. He was then taken up river and drowned by his mother, Judy Buenoano. (R 1556-57) Buenoano ultimately received approximately $100,000 in life insurance for the death of her son, Michael. (R 1573)

In any event, while evidence concerning the Vicon-C tablets was presented in the guilt phase, the evidence presented in support of the aggravating factor in the penalty phase was limited to evidence concerning the car-bombing. John Gentry and prosecutor Michael Patterson testified only as to the bombing of Gentry's car. Neither testified about the Vicon-C tablets. (R 1497-1550)

In Henderson v. Singletary, 617 So.2d 313, 316 (Fla. 1993), this Court reviewed a similar claim and stated:

> Moreover, Henderson would be entitled to no relief even if the claim were not barred. Although Henderson sought postconviction relief in connection with the prior convictions, all relief was denied by the trial court and an appeal of that denial is currently pending before the Fifth District Court of Appeal. (FN4) *Because the Putnam County convictions have not been vacated Johnson v. Mississippi,* 486 U.S. 578, 108 *S.Ct.* 1981, *100 L.Ed.2d 575 (1988), is inapplicable.* Tafero v. State, 561 So.2d 557

> (Fla.), cert. denied, 495 U.S. 925, 110 S.Ct. 1962, 109 L.Ed.2d 324 (1990); Eutzy v. State 541 So.2d 1143 (Fla.1989); Bundy v. State: *538* So.2d 445 (Fla.1989). *Even if the Putnam County convictions were vacated, the aggravating factor of prior conviction of a capital felony would still have been established beyond a reasonable doubt.* In this case, Henderson was convicted of three counts of first-degree murder and sentenced to death for each. As noted above, each of these convictions supports the finding of a prior capital felony conviction in connection with the other sentences. *Thus, consideration of the Putnam County convictions would be harmless beyond a reasonable doubt because there is ample independent support for this aggravating factor.* Tafero, *561* So.2d at 559.
>
> Henderson v. Singletary, 617 So.2d 313, 316 (Fla. 1993) (emphasis added)

Thus, as this Court held in Henderson and as the trial court found below, even if the sentence had been challenged and vacated, the admission of the conviction would be harmless in light of the prior unchallenged convictions. See, also, Preston v. State, 564 So. 2d 120 (Fla. 1990) (Harmless error analysis may be applied by appellate court if conviction for a prior violent felony that formed the basis for an aggravating circumstance is later set aside.) As Buenoano has failed to establish that the trial court erred in summarily denying this claim, her request for relief should be denied.

ISSUE VI

BUENOANO'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY WAS NOT VIOLATED WHEN JUROR BATTLE FAILED TO DISCLOSE DURING JURY SELECTION THAT HE HAD BEEN CONVICTED OF INVOLUNTARY MANSLAUGHTER IN PENNSYLVANIA.

Buenoano asserts that she is also entitled to a new trial because she recently learned that one of her jurors was convicted of involuntary manslaughter in Pennsylvania in 1978 and sentenced to one to three years imprisonment in a state institution. Based on the following, the state asserts that this claim is procedurally barred and that Buenoano has failed to present any basis upon which relief can be granted. With regard to this claim the trial court stated:

> In this claim, Buenoano alleges on February 19, 1998, her counsel learned through an anonymous tip that Juror J.B. Battle was convicted of involuntary manslaughter in Pennsylvania in 1978 and sentenced to one to three years imprisonment in a state institution. Buenoano contends this information is newly discovered evidence, and that based upon it, she is entitled to a new trial.
>
> To prevail on a claim based upon this evidence, which Buenoano asserts is newly discovered evidence, Buenoano must show that: 1) the facts were previously unknown, 2) the facts could not have been known by the use of due diligence, and 3) the evidence would probably produce an acquittal on retrial. Jones, 591 So.2d at 915. Buenoano has had over a decade to research and discover any alleged irregularities in the jurors' histories; thus, the fact that Juror Battle had a prior conviction could easily have been discovered through the exercise of due

> diligence. Thus, this claim is procedurally barred.
>
> However, alternatively, the Court finds that the evidence that Juror Battle had a prior conviction would have absolutely no effect on the outcome of the proceedings, and it most certainly would not produce an acquittal on retrial.
>
> Furthermore, Buenoano has not even attempted to assert how she was prejudiced by Juror Battle's presence on the jury. It seems that if anyone was prejudiced by the presence on the jury of an individual who had been convicted of manslaughter and who served time in a correctional institution, it would be the State.
>
> Based upon the foregoing, the Court finds that Buenoano is not entitled to relief on Claim V of her rule 3.850 motion.

Claims which could have or should have been raised on direct appeal are not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850. Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323 (Fla. 1994); Johnson v. State, 593 So.2d 206 (Fla.), cert. denied, --- U.S. ---, 113 s. ct. 119 (1992); Raulerson v. State, 420 So.2d 517 (Fla. 1982); Christopher v. State, 416 So.2d 450 (Fla. 1982); Alvord v. State, 396 So.2d 194 (Fla. 1981); Meeks v. State, 382 So.2d 673 (Fla. 1980). It is also not appropriate to use a different argument to relitigate the same issue. Torres-Arboleda, 636 So.2d at 1323; Medina v. State, 573 So.2d 293, 295 (Fla. 1990). The purpose of 3.850 motions is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on direct appeal. McCrae v. State, 437 So.2d 1388 (Fla. 1983).

This claim is procedurally barred. Juror Battle's criminal history was not objected to at trial nor was the issue raised on direct appeal to this Court. In Willacy v. State, 640 So.2d 1079 (1994), this Court rejected Willacy's claim that the trial court erred in denying his motion for new trial based on a claim that a juror was under prosecution when selected to sit on the jury. This Court noted that during the trial the State informed Willacy's counsel of the juror's status and his counsel voiced no objection. Accordingly, this Court held that by failing to make a timely objection, Willacy waived the claim.

In the instant case, defense counsel did not ask any of the jurors, including Juror Battle, about their criminal history. Nor did he move to have Juror Battle excused on this or any other basis. While collateral counsel maintains that this information could not have been discovered at the time of trial or during the last two rule 3.850 motions, the record shows that Mr. Battle, as did all of the other prospective jurors, filled out a juror voir dire questionnaire which indicates his criminal history. (Attached as Exhibit A) On his questionnaire, Mr. Battle responded affirmatively to four questions, including a question concerning whether he or any member of his family had "ever been accused, complainant, or witness in a criminal case." He also noted that the jury reached a verdict and that he was related to a law enforcement officer. If defense counsel was concerned about this

issue he could and should have inquired at that time. The failure to do so waives this claim for review. Willacv. See, also, Ford v. United States, 201 F.2d 300 (1953). Accordingly, this claim should be denied as procedurally barred. Porter v. State, 478 So.2d 33, 36 (Fla. 1985)(claim of recently discovered evidence that a grand juror was married to a relative of the victims rejected as not timely raised.) See, generally, Jenninus v. State, 583 So.2d 316 (Fla. 1991); Swafford v. Dugger, 569 So.2d 1264 (Fla. 1990); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Blanco v. State, 507 So.2d 1377 (Fla. 1987).

Furthermore, as this claim was raised for the first time in the motion to vacate filed on March 4, 1998, ten years after her conviction was affirmed on direct appeal it is clearly time-barred. Remeta v. Dugger, 622 So.2d 452 (Fla. 1993); Roberts v. State, 568 So.2d 1255 (Fla. 1990). Consistent with rule 3.850 (b), this Court has declined to consider an untimely claim based on evidence which could have been considered earlier by the exercise of due diligence. Bolender v. State, 658 So.2d 82 (Fla. 1995); Aaan v. State, 560 So.2d 222 (Fla. 1990).

Rule 3.850 (b) sets forth the time limitations for filing a motion to vacate. It expressly states, in pertinent part, that no motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final unless it alleges that the facts on which the claim is predicated

were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence. This is only a threshold requirement for filing an out of time motion. Bolender v. State, 658 So.2d 82 (Fla. 1995) In order to prevail on her claim of newly discovered evidence, however, Buenoano must demonstrate that the error would probably produce an acquittal on retrial. Correll v. State, 698 So.2d 522 (Fla. 1997); Bolender v, State, 661 So.2d 278 (Fla. 1995).

To paraphrase this Court's recent decision in Pope v, State, 22 Fla. Law Weekly S743 (Fla. December 4, 1997), "We do not overlook procedural default lightly. . . .We have clearly held that successive postconviction relief motions that were filed after the expiration of the time limit *must be based on newly discovered evidence. . . .* Here, [the defendant] has not alleged new or previously unknown evidence. Neither has [she] alleged that a fundamental constitutional right has been established which should apply retroactively to [her] case." Id. at 5744.

Clearly, this evidence was discoverable prior to the instant proceeding. Defense counsel had the juror questionnaires at trial and collateral counsel was given these documents in 1989 by the State Attorney's Office for Orange County at the time of the first public records request. Further, Buenoano has had 13 years to research and discover any irregularities in the jurors' histories. She has not. Therefore, this claim does not satisfy the threshold

requirement of rule 3.850(b) nor the first two prongs of Jones.

Even if Buenoano could satisfy the first two prongs, she clearly does not satisfy the last prong, i.e. that the evidence would probably produce an acquittal on retrial. Unlike those cases where new or recanting witnesses are discovered, the criminal history of a juror in no way affects the quantum of evidence presented below. Thus, on retrial, where the same evidence would be presented, the history of a prior juror would not probably produce an acquittal or a reduction in the sentence.[5]

Buenoano asserts error based on Skiles v. Ryder Truck Lines, Inc., *267* So.2d 379 (Fla. 1973) and Dela Rosa v. Zequeria, 659 So.2d 239 (Fla. 1995). The state maintains that whether Buenoano would have been entitled to relief on this claim on direct appeal or in a timely filed motion for new trial is not binding in a successive collateral motion. On direct appeal, this Court is precluded from reversing a conviction unless harmful error has been shown. §59.041 Fla. Stat. Whereas, this Court has repeatedly held that in order to file an untimely motion, the defendant must assert that she has newly discovered evidence and that in order to prevail on a newly discovered evidence claim the defendant must show that the error would *probably produce an acquittal on retrial.* Correll v. State, 698 So.2d 522 (Fla. 1997)(blood spatter expert's exaggeration of her credentials qualified did not constitute newly

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[5] The jury recommendation in the instant case was 10-2. (R 2329)

discovered evidence requiring reversal where discrepancies were not so great as to make any difference in outcome of capital murder trial where evidence of guilt was overwhelming); Stewart v. State, 632 So.2d 59 (Fla. 1993)(Evidence that certain persons, including former state attorney who prosecuted defendant, had rethought their prior positions on the propriety and efficacy of the death penalty did not show newly discovered evidence entitling defendant to a new trial.)

Moreover, even if those cases were applicable, it is clear that the juror's concealment of a material fact only denies to the party affected the right to make an intelligent judgment as to whether a juror should be excused and that the failure to disclose the information was not attributable to the complaining party's lack of diligence. De La Rosa v. Zequeira, 659 So.2d 239, 241 (Fla. 1995) ; Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379 (Fla. 1973). In the instant case, the party inquiring concerning criminal background and the party affected by the criminal background was the state, not the defense and the failure to disclose the information was attributable to Buenoano's lack of diligence and is not excused by the prosecutor's previous inquiry to the panel.

During voir dire, the prosecutor Belvin Perry inquired of the fifty-four person panel as follows:

> By Mr. Perry: Now, have you or any of your family members or close friends ever been

> personally interested in the outcome of any criminal case, that is, have any interest in the outcome of any criminal case? Anyone here?
>
> (R 4, 48)

Prospective juror Lomen responded that he had prosecuted several shoplifters. (R 49) Mr. Perry then moved on to his next question. He did not inquire again to the entire panel. Subsequently, however, he asked:

> All right, Have any of you or your close friends or family members ever been a victim of a crime, other than Mr. Lomen?
>
> (R 49)

The record does not reflect that Juror Battle responded to either question propounded by the prosecutor. (R 49)

Regardless, because the state, not the defense, was the party inquiring and the party affected, Buenoano would not have been entitled to relief on this claim even if it had been timely raised in a prior proceeding. In State v. Rodgers, 347 So.2d 610 (Fla. 1977), this Court held that a defendant was not entitled to a new trial where an underage juror, who was statutorily disqualified, sat on the jury because there no evidence that indicated the juror rendered unfair or impartial vote and where defense counsel did not object to the juror until after the verdict.

The holding in Rodaers was recently revisited by this Court in Lowrey v. State, 23 Fla. Law Weekly S27a (Fla. January 15, 1998). In Lowrey this Court held based on the unique circumstances

presented that it was reversible error for the trial court to deny a motion for new trial where a juror who was under a pending prosecution when he served but, though asked, failed to reveal the prosecution.[6] Lowrey, however, timely objected to the juror and the issue was properly raised on appeal. Further, unlike the circumstance of our case where Juror Battle's conviction was an out-of-state conviction six years before the instant trial, the juror in Lowrey had a prosecution pending before the same state attorney which was resolved in his favor nine days after Lowrey's trial. In the instant case, as in Roduers, there is no evidence or perception that the juror rendered an unfair or impartial vote. Similarly, in the instant case, as in Rodaers, defense counsel did not object to the juror being seated on the jury, even though he was on notice of the fact that Mr. Battle had affirmatively responded to the question on his questionnaire.

The federal courts have also considered this issue on initial review and held that where an objection is not asserted until after the verdict, even though the defendant was not previously aware of the facts which would support the disqualification, a new trial must be granted only if the defendant demonstrated "actual prejudice or other fundamental incompetence" of the juror in question. Rogers v. McMullen, 673 F.2d 1185, 1189 (11th Cir. 1982),

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[6] To the extent that Lowrey is a change or refinement in the law it is not cognizable in a successive motion to vacate. Witt v. State, 387 So.2d 922, 929 (Fla. 1980)

citing, Ford v. United States, *201* F.2d 300 (5th Cir. 1953). It is not enough to show that a juror might have a bias when he came through the door, a habeas petitioner must show actual prejudice. Depree v. Thomas, 946 F.2d 784 (11th Cir. 1991).[7]

In the instant case, where the evidence of Buenoano's guilt was overwhelming, and where she has produced absolutely no support for the contention that Juror Battle's presence on the jury denied her a fair trial. Thus, even if this claim was not procedurally barred, Buenoano would not be entitled to relief as there is no evidence that Buenoano was not afforded a fair and impartial jury.

As previously noted, however, to prevail on this claim in a *successive collateral proceeding,* Buenoano bears the burden of showing that it would probably produce an acquittal on retrial. Although she asserts that the Jones standard does not apply; that it "deals specifically with claims of newly discovered evidence of **innocence"** she cites no authority for this proposition other than Jones itself. However, this Court's opinion in Jones does not stand for this proposition and, in fact, does not even contain the word innocence. Furthermore, the standard of review on other collateral issues such as an ineffective assistance of counsel claim or **a** Brady claim, is essentially the same, the defendant must show that a reasonable probability that the result of the proceeding would have been different. Van Poyck v. State, 694

[7] The standard on a successive habeas, like a successive motion to vacate, is much higher.

So.2d 686, 698 (Fla. 1997); Haliburton v. Sinaletary, 691 So.2d 466 (Fla. 1997). Moreover, should this claim be presented in a successive petition for writ of habeas corpus in federal court federal law requires a habeas petitioner to establish that the claim relies on a new rule of constitutional law that was "previously unavailable" and has been made retroactively applicable, *or the factual predicate for the claim could not have been discovered previously through the exercise of due diligence* ***and*** *the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that,* ***but for the constitutional error,*** *no reasonable factfinder would have found the applicant guilty of the underlying offense.* Accordingly, Buenoano's contention that a lessor standard should be applied to her claim of newly discovered evidence raised for the first time in an untimely and successive motion is sheer sophistry and should be rejected by this Court.

In light of the facts of this case and Buenoano's failure to allege any facts which would support a conclusion that she is entitled to relief, the state urges this Court to find that this claim is procedurally barred and to deny relief. This court must enforce the procedural default policy, or appeal will follow appeal and there will be no finality in capital litigation. See, Johnson v. State, 536 So.2d 1009 (Fla. 1988) (the credibility of the

criminal justice system depends upon both fairness and finality). The expressed finding by this Court of a procedural bar is also important so that any federal courts asked to consider Buenoano's claims in the future will be able to discern the parameters of their federal habeas review. Rogers v. McMullen, 673 F.2d 1185 (11th Cir. 1982)(Because the Florida Supreme Court reached the constitutional issue we are not foreclosed from addressing the merits of claim that an unqualified juror sat on the jury.) See, also, Harris v. Reed, 489 U.S. 255, 109 S. Ct. 1083, 103 L. Ed. 2d 308 (1989); Wainwriaht v. Svkes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by delivery to the Office of the Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, Florida 32314-5498, this 16 day of March, 1998.

CO-COUNSEL FOR STATE OF FLORIDA