IN THE SUPREME COURT OF FLORIDA

BRYAN FREDRICK JENNINGS,

Appellee,

V. **CASE NO. 93,056**

STATE OF FLORIDA,

Appellant.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
Assistant Attorney General
Fla. Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

CERTIFICATE OF FONT

This brief is typed in Courier New 12 point.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

STATEMENT OF THE CASE AND FACTS[1]

This appeal is from the Brevard County Circuit Court's March 18, 1998, denial of Jennings' second amended motion for relief pursuant to *Florida Rule of Criminal Procedure* 3.850. The statement of the case and facts contained in Jennings' brief is argumentative, incomplete, and inaccurate -- the State relies upon the following statement of the case and facts.

The Guilt Phase Facts

On direct appeal from his conviction and sentence of death, this Court summarized the facts of Jennings' crime as follows:

> In the early morning hours of May 11, 1979, Rebecca Kunash was asleep in her bed. A nightlight had been left on in her room and her parents were asleep in another part of the house. The Defendant went to her window and saw Rebecca asleep. He forcibly removed the screen, opened the window, and climbed into her bedroom. He put his hand over her mouth, took her to his car and proceeded to an area near the Girard Street Canal on Merritt Island. He raped Rebecca, severely bruising and lacerating her vaginal area, using such force that he bruised his penis. In the course of events, he lifted Rebecca by her legs, brought her back over his head, and swung her like a sledge hammer onto the ground fracturing her skull and causing extensive damage to her brain. While she was still alive, Defendant took her into the canal and held her head under the water until she drowned. At the time of her death, Rebecca Kunash was six (6) years of age.

---

[1] Jennings opens his brief with a nine-page "introductory statement". The *Rules of Appellate Procedure* do not allow for such a hyperbolic recitation, and the State suggests that, because there is no provision for an "introductory statement", it should be disregarded in its entirety by this Court. Because that portion of Jennings' brief is argumentative and inaccurate, the State does not accept any "fact" averred therein.

> The judge determined the following aggravating circumstances:
>
> 1. The murder was committed by appellant while he was engaged in the commission of, or flight after committing, the crimes of burglary, kidnapping and rape.
>
> 2. The murder was especially heinous, atrocious or cruel.
>
> 3. The murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> The record fully supports all three findings.

Jennings v. State, 512 So.2d 169, 175-6 (Fla. 1987).[2] This Court affirmed Jennings' conviction and death sentence.

The Previous Rule 3.850 Proceedings

In his prior Rule 3.850 proceeding, Jennings raised a claim of a violation of *Brady v. Maryland* which was based upon the alleged suppression of a tape recorded interview of one Judy Slocum. The Rule 3.850 court denied relief on that claim, stating:

---

[2] This Court summarized the prior history of this case as follows:

> This was his third trial regarding the killing. On appeal from his first trial, this Court vacated his sentence and remanded for a new trial. *Jennings v. State,* 413 So.2d 24 (Fla. 1982). On retrial he was again convicted and sentenced to death, and this Court affirmed both the conviction and sentence. *Jennings v. State*, 453 So.2d 1109 (Fla. 1984). On petition for certiorari, however, the United States Supreme Court ordered the vacation of Jennings' sentence and a remand for new trial, *Jennings v. Florida*, 470 U.S. 1002, 105 S.Ct. 1351, 84 L.Ed.2d 374 (1985), which this Court did. *Jennings v. State*, 473 So.2d 204 (Fla. 1985).

Jennings v. State, 512 So.2d 171.

In this claim defendant contends and the State concedes that the State violated the discovery rules by failing to disclose and produce the taped statement of Judy Slocum. Trial defense counsel now avers that had he known of the contents of the tape he would have used Slocum both in the guilt phase to bolster his defense of intoxication and during the penalty phase to add to his proof of the defendant's intoxication as a mitigating factor. Although this contention is not unexpected at this juncture of these proceedings, it is, nevertheless, belied by the record.

First, without doubt, the defendant had knowledge not only of Slocum's name but also the subject matter of her knowledge about the case. Not only was Jennings aware of her participation in the evening's events, defense was aware of the statement of Russell Schneider that Judy Slocum drove Bryan to his mother's house at about 11:30-12:00 p.m. to change his pants because his zipper was broken and that Jennings had been drinking large amounts of beer. Defense was also aware of the statement of Charles Clawson that Jennings had a girl drive him over to his mother's house about 10:00-11:00 p.m. because he felt he was unable to drive. Is it surprising, then, that Slocum's statement indicates that she drove Jennings home to change his pants because his zipper was broken and that he appeared "much loaded"? The Slocum statement merely confirmed the Schneider and Clawson statements.

All three statements, however, seem less significant than another statement known to the defense. Floyd Canada stated that he was with Jennings up to a few minutes before the murder occurred. He stated that he observed Jennings and a couple of other guys share four or five pitchers of beer at the Barleycorn and that Jennings was pretty loaded by around two o'clock. He then went with Jennings to the Booby Trap where they continued to drink until around 4:30 a.m. Jennings passed out in Canada's car on the way back to the Barleycorn. When they reached the Barleycorn, Jennings had trouble getting out of Canada's car and then staggered towards his own car. If defense counsel were truly interested in an intoxication defense, how could he ignore the Canada testimony and yet claim prejudice because he was not given the Slocum statement? The fact is that intoxication was never intended to be a part of Jennings' defense strategy. Defense counsel stated on more than one occasion, "The issue in this case is identity."

> Defense requested and received a charge on intoxication not because it put on a case for intoxication, but because of the almost incidental testimony of Mrs. Danna, Jennings' mother, during the state's case. She testified that during the early morning hours of the day of the murder, she was awakened by Mrs. Music who told her that Jennings had come home drunk, almost knocked a picture off the wall, and went out again in search of cigarettes. This was the defense's total intoxication defense.
>
> Mrs. Music, who observed the "drunk" Jennings and reported it to her sister, was not called. Neither Canada (nor his deposition if he were unavailable) nor Schneider were offered for this defense. Donna Clement, who heard her aunt, Catherine Music, talking to Jennings at about 6:00 a.m. and asking him if he were drunk, was not called. Charles Clawson, who was with Jennings until 2:30 a.m. at the Barleycorn and was aware that Jennings asked Slocum to drive him home because he felt he was unable to drive, was not called. It is inconceivable that had the state disclosed Slocum's statement, which merely confirms that which the record reflects she would have said, the theory of the defense would have changed.
>
> (Footnotes omitted.) We agree with the trial court's analysis of the effect the tape would have had on the trial. **The trial court properly rejected this claim because there was not a reasonable probability that the tape would have caused a different outcome at the trial.** *See Duest v. Dugger*, 555 So.2d 849 (Fla. 1990).

Jennings v. State, 583 So.2d 316, 318-19 (Fla. 1991)[emphasis added]. Jennings raised a claim of guilt phase ineffective assistance of counsel, which was decided adversely to him by the trial court and affirmed by this Court:

> Contrary to trial counsel's belated contention, the record reflects that the defense elected a strategy to obtain a not guilty verdict based on lack of identity. Since intoxication would not have been a defense to felony murder based on the underlying felony of sexual battery (an offense for which Jennings was also convicted), this appears to have been sound strategy. Having failed in his "lack of identity" defense, Jennings is now asking this court for relief not requested from

the jury.

It cannot be said that the defense strategy to seek acquittal on the basis of insufficient identity rather than raise the defense of intoxication was negligence as a matter of law. After all, the most damning evidence, Jennings' confession, had been suppressed and the trial was being conducted over three hundred miles and seven years from the murder. On the other hand, the strongest evidence of intoxication, even if a viable defense, would have to be weighed against the mental alertness and physical dexterity evident in the planning and execution of this murder. It cannot be said that defense counsel failed to present an "intelligent and knowledgeable defense."

And the record refutes the contention that defense counsel failed to investigate appropriate witnesses. Aside from Slocum which was discussed earlier, lets look at the allegations:

(a) Defense counsel failed to contact Annis Music to see what knowledge she had about the level of Jennings' intoxication. It should be noted that her present affidavit is given over ten years after the incident reported in the affidavit. Further, by placing herself in the living room at the time Jennings came home early in the morning on the date of the murder, she appears to be inconsistent with the testimony of her mother given shortly after the incident. And finally, her testimony merely confirms that given by Mrs. Music and which, by design, was not presented to the guilt jury.

(b) Defense counsel failed to contact Charles Clawson to determine his knowledge of the facts. Of course, defense counsel had the advantage of Clawson's deposition. He knew, for example, that Clawson had stated that although he could not remember the events too clearly or how much they were drinking, he "wouldn't say he [Jennings] had too much." And as to Jennings' condition when he last saw him at 2:30 a.m., "He looked like -- I mean you could tell he had been drinking. I mean, he wasn't staggering, falling down, walking into bars, or anything like that. He could talk. He looked like he was just--." And concerning drugs and hard liquor: "... The only time I saw him all night was in the bar and he was just drinking beer."

> Based on that record testimony, was defense counsel negligent in not pursuing Clawson as a witness? Should he have anticipated that, many years after the event, Clawson would "remember" the events more clearly -- that Jennings was indeed drinking hard liquor and "was staggering, his eyes were glassy and he could not keep his head up straight"? Present counsel's statement that evidence in support of the intoxication defense was available but not discovered borders on misrepresentation. Such evidence as there was had been discovered and was well known, but was abandoned in favor of the identity defense.

Jennings v. State, 583 So.2d 316, 319-20 (Fla. 1991).

Jennings also claimed that his trial mental state experts provided inadequate examinations, that he received ineffective assistance of counsel at the penalty phase of his trial, that the cold, calculated, and premeditated aggravator was unconstitutionally applied, and that the state attorney's office had a conflict of interest. *Id.*

With regard to the penalty phase ineffective assistance of counsel claim, this Court held:

> Jennings' next claim is that he received ineffective assistance of counsel during the penalty phase of his trial because his counsel failed to investigate and present evidence of mitigation as to his alcohol consumption. The trial judge also rejected this claim as follows:
>
> > Likewise, the court again finds that defense counsel was aware of the evidence of intoxication in the penalty phase. And he presented evidence of intoxication to the penalty jury.
> >
> > Mrs. Music: "... he just came in and when he saw me he staggered and fell against the wall. And I said, Bryan, be careful, and he said something like, oh, I am so drunk.

and

> Russell Schneider: Jennings drank about a gallon and a half of beer up until 2:30 a.m. Jennings was still drinking when Schneider left.
>
> These statements were from eye witnesses who observed his drinking experience and his physical condition just about three hours before and shortly after the murder. This coupled with the hypothetical question asked of the medical experts to the effect that Jennings consumed from two to five gallons of beer in about four to six hours constituted a good effort to convince the jury to find intoxication as a mitigating factor.
>
> It is not negligent to fail to call everyone who may have information about an event. Once counsel puts on evidence sufficient, if believed by the jury, to establish his point, he need not call every witness whose testimony might bolster his position. Defense counsel, at the time, determined that the Schneider and Music testimony along with the hypothetical questions to the experts would be sufficient to establish the intoxication mitigating circumstance. He did not put on Canada or his deposition. The appropriate legal standard is not error-free representation, but "reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Foster v. Dugger*, 823 F.2d 402 (11th Cir. 1987). Otherwise counsel could merely hold back a witness with cumulative knowledge about the facts and present him on the Rule 3.850 motion as evidence of ineffective assistance of counsel.
>
> We agree that defense counsel's performance at the penalty stage was not ineffective under *Strickland* and affirm the denial of this claim.

Jennings v. State, 583 So.2d at 321.

This Court found the following Rule 3.850 claims procedurally

barred:

(1) The state's mental health experts improperly relied on Jennings' unconstitutionally obtained confession.

(2) The jury was improperly instructed on the three murder counts and the appropriateness of the death penalty after Jennings was convicted on all three counts.

(3) Jennings' due process and confrontation rights were violated because he was not allowed to introduce prior sworn statements of a state witness during cross-examination.

(4) Jennings was prejudiced because the jury knew of his prior convictions for these crimes.

(5) The trial court allowed evidence seized in a warrantless arrest to be admitted at trial.

(6) The trial court failed to weigh independently aggravating and mitigating factors.

(7) **The jury instruction for the heinous, atrocious, or cruel aggravating factor was unconstitutional** under *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

(8) **The jury instruction for the cold, calculated, and premeditated aggravating factor was unconstitutional** under *Maynard v. Cartwright*.

(9) Jennings' death sentence rests upon an unconstitutional automatic aggravating circumstance.

(10) The prosecutor argued for the application of nonstatutory aggravating factors.

(11) The judge and jury failed to find mitigating circumstances established in the record, and the judge improperly instructed the jury on what it could consider in mitigation.

(12) The jury instructions at sentencing shifted the burden of proof to Jennings to prove that death was not the appropriate penalty.

(13) The jury instructions at sentencing diluted the

> jury's sense of responsibility for Jennings' sentence.
>
> (14) The judge failed to instruct the jury that his instruction during the guilt phase to set aside sympathy and mercy did not apply during the sentencing phase.
>
> (15) Victim impact evidence was improperly admitted. We also note that we do not find any ineffective assistance of trial counsel in the subject matter of these claims.

Jennings v. State, 583 So.2d at 322. With regard to the other claims contained in the Rule 3.850 motion, this Court stated:

> We reject without discussion Jennings' remaining claims, listed below, brought in his rule 3.850 motion:
>
> (1) **The state violated *Brady* by withholding a letter from Clarence Muszynski requesting the appointment of an attorney.**
>
> (2) The trial court erred because it did not hold an evidentiary hearing on the rule 3.850 motion.

Jennings v. State, 583 So.2d at 322. [emphasis added].

In addition to the claims contained in the Rule 3.850 appeal, Jennings raised the following claims in his petition for writ of habeas corpus:

> We summarily deny the following claims as procedurally barred because they either were raised or should have been raised on direct appeal:
>
> (1) The jury instruction for the heinous, atrocious, or cruel aggravating factor was unconstitutional under *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).
>
> (2) The jury instruction for the cold, calculated, and premeditated aggravating factor was unconstitutional under *Maynard v. Cartwright*.
>
> (3) The judge and jury failed to find mitigating circumstances that were established in the record and the

judge improperly instructed the jury on what it could consider as mitigating evidence.

(4) The cold, calculated, and premeditated aggravating factor was unconstitutionally applied retroactively.

(5) Jennings' due process and confrontation rights were violated because he was not allowed to introduce prior sworn statements of a state witness during cross-examination.

(6) The jury instructions at sentencing shifted the burden of proof to Jennings to prove that death was not the appropriate penalty.

(7) The trial court failed to weigh independently aggravating and mitigating factors.

(8) The state's mental health experts improperly relied on Jennings' unconstitutionally obtained confession.

(9) The judge failed to instruct the jury that his instruction during the guilt phase to set aside sympathy and mercy did not apply during the sentencing phase.

(10) The trial court allowed evidence seized in a warrantless arrest to be admitted at trial.

(11) Jennings was prejudiced because the jury knew of his prior convictions for these crimes.

(12) Jennings' death sentence rests upon an unconstitutional automatic aggravating circumstance.

(13) The prosecutor argued for the application of nonstatutory aggravating factors.

(14) The jury instructions at sentencing diluted the jury's sense of responsibility for Jennings' sentence.

(15) The jury was improperly instructed on the three murder counts and the appropriateness of the death penalty after Jennings was convicted on all three counts.

We also deny the claims of ineffective assistance of counsel as they relate to the foregoing claims.

Jennings v. State, 583 So.2d at 322-3 n. 3.[3]

The Court did, however, find merit to Jennings' claim that he was entitled to certain portions of the State's files pursuant to Chapter 119 of the *Florida Statutes.* This Court consequently remanded this case to allow the opportunity to file any *Brady* claims arising from the disclosure of the files at issue. *Jennings v. State*, 583 So.2d at 319.

The Evidentiary Hearing Facts

On October 30-31, 1997, the Brevard County Circuit Court conducted an evidentiary hearing in this case. (TR53).

Dr. Henry Dee, a neuro-psychologist, testified for Jennings. (TR62-3). Dr. Dee was accepted as an expert in the field of neuro-psychology (TR65), and testified that, in his opinion, Jennings shows evidence of "cerebral damage of unknown etiology". (TR89). According to Dee, the act committed by Jennings is the kind of offense that is committed by someone who is "terribly disturbed." (TR90). Dee is of the opinion that both of the statutory mental mitigating circumstances apply to Jennings. (TR96-8). Dee also testified that, in his opinion, various non-statutory mitigators applied, such as Jennings' lack of a "father figure" (TR99), his

[3] This Court addressed Jennings' claim of a violation of *Booth v. Maryland*, and denied relief. *Jennings v. State*, 583 So.2d at 323.

"diagnosis" of ADHD[4] (TR100), and "some deep-seeded problem having to do with [] sexual adjustment" (TR101). Jennings admitted entering the victim's room to Dee, and said that, after that, "things pretty much went on their own." (TR115). Dee does not think that Jennings fits the diagnostic criteria for anti-social personality disorder. (TR117).

Annis Music Clawson is Jennings' cousin. (TR128-9). She identified an affidavit that she had executed previously, and testified that prior to the 1989 date of that affidavit, she was never contacted by counsel for Jennings and asked about her knowledge of the events of May 11, 1979[5]. (TR132). She testified that, when she saw Jennings on that day, he was intoxicated, and could have been taking drugs. (TR137-8). Jennings and Annis Clawson lived at the same residence, which, on May 11, 1979, belonged to Annis' mother. (TR139). At the time of the hearing in this case, the residence belonged to Jennings' mother. (TR139). Annis Clawson's mother has testified several times in this case about Jennings' behavior and appearance when he came into the house. (TR140). Annis Clawson only saw Jennings for a short period of time. (TR143-4).

Patrick Clawson identified the affidavit that he executed in

---

[4] ADHD is the acronym for Attention Deficit Hyperactivity Disorder. (TR101).

[5] The day of the murder giving rise to this case.

1989. (TR146). Patrick remembers that Jennings was "pretty inebriated" at 2:30 in the morning on May 11, 1979. (TR148). In a statement given to law enforcement in 1979, Clawson stated that Jennings was drunk, but that he was responsible, could "talk straight", and was not slurring his words. (TR152).

Raymond Facompre saw Jennings at about 10:00 AM on May 11, 1979, at his home. (TR157). Jennings was "hung over" at that time. (TR159).

Wayne Porter (who testified out-of-order) was the case agent for the Brevard County Sheriff's Office assigned to this case. (TR160-61). Jennings became a suspect in this case during the evening of the day of the murder after fingerprint comparisons had been completed. (TR161-2). Jennings was arrested early in the morning on May 12, 1979. (TR162). No evidence came to light, during the course of this case, that would link anyone other than Jennings to the scene of the crime. (TR163). A person named Joseph Hildebrand came to light as a possible lead, but no evidence ever developed to link him to the scene or otherwise implicate him in this crime. (TR165). An inmate in the county jail named Allen Kruger volunteered information about this case -- no threats, offers, or other inducements were made in connection with Kruger's cooperation and testimony. (TR167). Another jail inmate, Clarence Muszinski, also came to light as a witness. (TR167). Investigator Porter interviewed Kruger first, and later interviewed Muszinski.

(TR168). Muszinski was never an agent of law enforcement. (TR169)[6].

Jennings' trial counsel, Vincent Howard, testified at length about his representation of the defendant in this case. (TR186). Mr. Howard testified that there was not much objective support for an intoxication defense, and that, in any event, such a strategy had already been unsuccessfully used in one of Jennings' prior trials. (TR231; 234). Mr. Howard also pointed out that there was no objective evidence that Jennings was using LSD on the night of the murder. (TR237; 270). Further, he testified that, under the facts of this case, "voluntary intoxication" was not a strong mitigator. (TR263).[7] Mr. Howard had information about Jennings' military service, which included information about past criminal activity Jennings had been charged with by military authorities. (TR274). Counsel did not want to place the unfavorable information before the jury. (TR274).

During cross-examination, Mr. Howard clarified that, with regard to various handwritten notes that he reviewed, he was familiar with the substance of the notes, and did not expect that the prosecutor would turn over personal notes to defense counsel.

---

[6] Investigator Porter identified a field interview card which contained information from Debra Greg about a man that she had seen at the beach the day before the murder. (TR183). The victim was abducted from her home, which is eight or nine miles from the beach. (TR183).

[7] Jennings had self-reported using LSD to one or more of the mental state evaluators. (TR265).

(TR277). Witness Crisco testified, when Mr. Howard deposed him, that Jennings had stated that he "just couldn't help it". (TR277-8). Crisco also testified during deposition that the victim was unconscious when Jennings threw her out the window of her room. (TR278). No evidence exists that suggests that Crisco was given any benefit in exchange for his testimony. (TR280). A letter from Jennings to Muszinski indicates that the information given law enforcement by Kruger was correct. (TR284).[8] Insofar as the man seen on the beach by Debra Greg was concerned, he was a potential "phantom suspect" because he was never identified, but, nevertheless, the likelihood of successfully using anything related to that person is small. (TR288). In any event, any "phantom suspect" defense faced the problem that Jennings' fingerprints were at the scene, and his shoes were consistent with the shoe impressions found at the scene. (TR288-9)[9].

Mr. Howard was never told that Annis Clawson was present when Jennings returned to his home (TR294), and, moreover, Catherine Music's statement is consistent, based upon its use of the first person, with her having been the only person who saw Jennings.

---

[8] Jennings' fingerprints were found on this letter, and there was testimony that the handwriting was his. (TR285).

[9] Jennings confessed to the murder to the mental state examiners, as well as to three county jail inmates. (TR292).

(TR295).[10] In any event, the testimony about Jennings' level of intoxication given by Annis and Catherine is not consistent. (TR295-6). The complexity of Jennings' actions in committing this crime create problems with an intoxication defense. (TR300). The facts undercut intoxication, as does the fact that Jennings told at least one mental health evaluator about the crime in great detail. (TR302). Moreover, Jennings never claimed that he was hallucinating, delusional, or otherwise under the effects of LSD. (TR303).[11] Yet another difficulty with an intoxication defense is that such a defense requires the defendant to admit that he committed the offense in question, which, in this case, was not subject to a voluntary intoxication defense.[12] As Mr. Howard pointed out, if the jury rejects an involuntary intoxication defense, the result is almost certainly a conviction, because the defendant has already admitted to the offense. (TR309).

Michael Hunt is an assistant state attorney in the Eighteenth Judicial Circuit, and was assigned Jennings' case at the time of the second trial. (TR331). Mr. Hunt identified various notes made

---

[10] Catherine and Annis are mother and daughter.

[11] Floyd Canada first told law enforcement that Jennings was not intoxicated, but later stated, in deposition, that he was. (TR306). That inconsistency exposed him to impeachment, had he testified. (TR251).

[12] While the premeditated murder charge would be subject to such a defense, the felony-murder charges (murder during sexual battery and kidnapping), would not.

by him during his preparation for trial, including his notes from an interview with witness Kruger. (TR332). Those notes are a synopsis of the interview -- they are not a verbatim record of what was said. (TR332-3). All of the evidence is that Muszinski was the first jail inmate to become known to law enforcement, and that Kruger came forward independent of Muszinski. (TR 334-6). Mr. Hunt's note that suggests the opposite is erroneous. (TR334-5). Finally, Mr. Hunt's note "omit - no agency proof" does not mean that either Muszinski or Kruger were agents of law enforcement -- there is no evidence of any such agency. (TR 338).

On March 19, 1998, the Brevard County Circuit Court issued an order denying all relief. This appeal follows. (R770).

SUMMARY OF THE ARGUMENT

Jennings' *Brady* claim is not a basis for relief because it has no factual basis. Moreover, various component parts of this claim were rejected in the prior decisions of this Court. To the extent that Jennings includes an ineffective assistance of counsel component in this claim, such a claim is, in the context of this case, inconsistent with the *Brady* claim. Moreover, such a claim is outside the scope of this Court's order remanding the case to the trial court to allow Jennings to plead *Brady* claims arising from records produced pursuant to Chapter 119.

The penalty phase jury instruction claim was correctly decided by the Rule 3.850 trial court. Further, this Court upheld the

applicability of the heinous, atrocious, or cruel and cold, calculated, and premeditated aggravators on direct appeal. Moreover, this claim is outside the scope of this Court's remand order, inasmuch as it is not based upon any matters produced pursuant to Chapter 119. Finally, the jury instruction claims were decided adversely to Jennings in his previous Rule 3.850 proceeding, when they were found procedurally barred.

Jennings' claim concerning juror interviews, and the Florida Bar Rule forbidding such interviews, is not within the scope of the remand order. In fact, this claim was raised for the first time on remand, and, therefore, is time-barred. Moreover, this claim lacks merit as a matter of law.

The "public records" claim is not a basis for relief because no records were improperly found to be exempt from disclosure.

The method of execution claim is not a basis for relief because Jennings' position is contrary to binding precedent.

ARGUMENT

I. THE *BRADY* CLAIMS

On pages 49-73 of his brief, Jennings alleges various violations of *Brady v. Maryland*. These claims are "based" upon imaginative interpretations of various documents. The Rule 3.850 trial court found these claims meritless, and that finding should be affirmed in all respects for the reasons set out below. Also contained within this issue are claims of ineffective assistance of

counsel which are pleaded in the alternative to the *Brady* claims[13], as well as various claims that were decided by this Court in the prior Rule 3.850 proceeding.

On pages 53-56 of his brief, Jennings attempts to construct a *Brady* claim out of notes taken, during a 1982 interview with the witness Kruger, by an Assistant State Attorney. Jennings' brief is unclear as to exactly why the "notes" were "exculpatory", but, despite that failing, the Circuit Court's order denying relief disposes of this claim. In that order, the Circuit Court made the following findings:

> Notes from the State Attorney's Office referencing an interview with Allen Kruger on May 20, 1982, disclosed pursuant to the Public Records request, indicate: "(Note - W. came to light after Rick Mus. told BCSO of his presence)". (See Exhibit "F", State Attorney Notes C44 -- Defendant's appendix). These notes were made by Michael Hunt, Assistant State Attorney, Eighteenth Judicial Circuit. Mr. Hunt's testimony at the evidentiary hearing was that this was a parenthetical note to himself, not something conveyed to him by the witness. Further he testified that he was not initially involved in the investigation of the case and would have to rely upon the case reports but that "Mr. Kruger came forward voluntarily, at some point, independent of Mr. Muszinski [sic]." (See Exhibit "E", Evidentiary Hearing Testimony -- Michael Hunt, pgs. 278-290).
>
> At the third trial, Muszynski testified that Kruger went to the State first. (See Exhibit "G", Trial Testimony -- Clarence Muszynski, pg. 679). Kruger's testimony [footnote omitted] was: "They [State Attorney's Office] didn't seek me out. I volunteered." (See Exhibit "H",

---

[13] The *Brady* and ineffective assistance of counsel claims are mutually exclusive, at least in this case. Jennings should elect which theory he wants to use, instead of trying to litigate his claims with alternative, mutually exclusive, theories.

> Trial Testimony -- Allen Kruger). Wayne Porter, formerly the case agent of the Brevard County Sheriff's office assigned to this case, testified at the evidentiary hearing that, "I interviewed Kruger first, as I recall, and the case reports seem to reflect that. My report said that I interviewed Kruger on June the 21st of 1979, followed by another cell mate, and, then on the 25th, I again interviewed Kruger and Muszinski [sic]." (Exhibit "E").
>
> How Kruger came forward or when Kruger came forward is not favorable evidence which was suppressed or would have changed the outcome of the trial. The parenthetical note of Michael Hunt appears to be an error on the part of Mr. Hunt; it was based solely on his review of previously disclosed case reports. **The fact remains that Kruger came forward voluntarily, and all of the credible testimony shows that he came forward before Muszynski.** Additionally, the notes of Michael Hunt regarding Kruger having discussed his testimony with Muszynski and having been shown written materials by the State (See Exhibit "F"), are not exculpatory evidence that must be disclosed.

(TR775-777). [emphasis added]. Those findings of fact are supported by competent substantial evidence, are not an abuse of discretion, and should be affirmed in all respects. *State v. Spaziano,* 692 So.2d 174 (Fla. 1997). When the evidence is fairly considered, there is no doubt that the "Kruger statement" referred to by Jennings is neither favorable nor exculpatory. There was no "*Brady* violation" because there was, as the Rule 3.850 court found, nothing that supported Jennings' claim. Contrary to Jennings' implication, the true facts support the finding of the trial court that "[t]he statement contained in the notes of Michael Hunt is substantially the same testimony given at trial." (TR778). As Jennings argues in his brief, "[t]here are three components of a

true *Brady* violation: the evidence at issue must be favorable ...; that evidence must have been suppressed ...; and prejudice must have ensued." *Strickler v. Greene,* 119 S.Ct. 1936, 1948 (1999). None of those components exist here, and there is no basis for relief[14].

On pages 56-57 of his brief, Jennings argues that he is entitled to relief because the State "withheld" a tape recorded statement given by Judy Slocum. This Court rejected this claim in 1991, stating:

> First, we consider Jennings' appeal from the trial court's denial of his rule 3.850 motion. Jennings' first claim in this appeal is that the state withheld material, exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Jennings claims that the state withheld a taped interview with Judy Slocum, who had driven Jennings home to change his clothes on the night of the murder. In the interview, Slocum stated that Jennings was "very much loaded" when she drove him home. Jennings argues that Slocum's testimony would have been material to both the guilt and penalty phases of the trial.
>
> In rejecting this claim, the trial court stated:
>
> > In this claim defendant contends and the State concedes that the State violated the discovery rules by failing to disclose and produce the taped statement of Judy Slocum. Trial defense counsel now avers that had he known of the contents of the tape he would have used Slocum both in the guilt phase to bolster his defense of intoxication and during the penalty phase

---

[14] In his brief, Jennings alleges that the note "omit - no agency proof" refers to witness Kruger. In the trial court, Jennings argued that that note referred to witness Muszynski, and the trial court decided that claim adversely to Jennings. (TR 778-79). Jennings cannot now change his "theory".

to add to his proof of the defendant's intoxication as a mitigating factor. Although this contention is not unexpected at this juncture of these proceedings, it is, nevertheless, belied by the record.

First, without doubt, the defendant had knowledge not only of Slocum's name but also the subject matter of her knowledge about the case. Not only was Jennings aware of her participation in the evening's events, defense was aware of the statement of Russell Schneider that Judy Slocum drove Bryan to his mother's house at about 11:30-12:00 p.m. to change his pants because his zipper was broken and that Jennings had been drinking large amounts of beer. Defense was also aware of the statement of Charles Clawson that Jennings had a girl drive him over to his mother's house about 10:00-11:00 p.m. because he felt he was unable to drive. Is it surprising, then, that Slocum's statement indicates that she drove Jennings home to change his pants because his zipper was broken and that he appeared "much loaded"? The Slocum statement merely confirmed the Schneider and Clawson statements.

All three statements, however, seem less significant than another statement known to the defense. Floyd Canada stated that he was with Jennings up to a few minutes before the murder occurred. He stated that he observed Jennings and a couple of other guys share four or five pitchers of beer at the Barleycorn and that Jennings was pretty loaded by around two o'clock. He then went with Jennings to the Booby Trap where they continued to drink until around 4:30 a.m. Jennings passed out in Canada's car on the way back to the Barleycorn. When they reached the Barleycorn, Jennings had trouble getting out of Canada's car and then staggered towards his own car. If defense counsel were truly interested in an intoxication defense, how could he ignore the Canada testimony and yet claim prejudice because he was not given the Slocum statement? The fact is that intoxication was never

> intended to be a part of Jennings' defense strategy. Defense counsel stated on more than one occasion, "The issue in this case is identity."
>
> Defense requested and received a charge on intoxication not because it put on a case for intoxication, but because of the almost incidental testimony of Mrs. Danna, Jennings' mother, during the state's case. She testified that during the early morning hours of the day of the murder, she was awakened by Mrs. Music who told her that Jennings had come home drunk, almost knocked a picture off the wall, and went out again in search of cigarettes. This was the defense's total intoxication defense.
>
> Mrs. Music, who observed the "drunk" Jennings and reported it to her sister, was not called. Neither Canada (nor his deposition if he were unavailable) nor Schneider were offered for this defense. Donna Clement, who heard her aunt, Catherine Music, talking to Jennings at about 6:00 a.m. and asking him if he were drunk, was not called. Charles Clawson, who was with Jennings until 2:30 a.m. at the Barleycorn and was aware that Jennings asked Slocum to drive him home because he felt he was unable to drive, was not called. It is inconceivable that had the state disclosed Slocum's statement, which merely confirms that which the record reflects she would have said, the theory of the defense would have changed.

(Footnotes omitted.) We agree with the trial court's analysis of the effect the tape would have had on the trial. The trial court properly rejected this claim because there was not a reasonable probability that the tape would have caused a different outcome at the trial. *See Duest v. Dugger,* 555 So.2d 849 (Fla.1990).

Jennings v. State, 583 So.2d 316, 318-9 (Fla. 1991). This Court has already affirmed the resolution of the claim concerning the Slocum tape, and Jennings cannot relitigate that claim in this

proceeding.[15]

On page 58 of his brief, Jennings argues that he is entitled to relief based upon the "non-disclosure" of a letter from Muszynski to the State Attorney seeking appointment of counsel. This claim is not available to Jennings because it has previously been rejected by this Court. In its 1991 opinion in this case, this Court held:

> We reject without discussion Jennings' remaining claims, listed below, brought in his rule 3.850 motion:
>
> (1) The state violated *Brady* by withholding a letter from Clarence Muszynski requesting the appointment of an attorney.

Jennings v. State, 583 So.2d at 322. Any claim relating to the Muszinski letter has already been resolved adversely to Jennings, and cannot be relitigated in this proceeding. Moreover, because this Court expressly rejected the claim, there is no "cumulative error" to consider.

Jennings also argues, on page 58 of his brief, that "other suspects information" should have been turned over to him. In deciding this claim adversely to Jennings, the trial court pointed out that the State is not required to provide the defense with every piece of information regarding other suspects, and went on to

---

[15] To the extent that Jennings' claim is that the non-disclosure of the Slocum tape is an "error" that must be factored into the "cumulative error" analysis, there is no legal basis for that claim. There is no rule of law that requires that a claim that has been **rejected** as a basis for relief can somehow become error that must be "cumulatively" evaluated. Such a theory has no legal basis.

find:

It has been alleged that the defense could have used the information regarding these suspects in its defense; the evidence negates this contention. "If a defendant's purpose is to shift suspicion from himself to another person, evidence of past criminal conduct of that other person should be of such nature that it would be admissible if that person were on trial for the present offense." [citations omitted]. The information contained in the notecards would not have been admissible.

Defense counsel, testifying at the evidentiary hearing on this matter, stated:

> ...with that one exception [the notecard referring to Debra Greg meeting a guy at the beach on 5/10/79 who had a gash on his leg] (See Exhibit "I", Notecard) none of the other field interrogation cards gave you enough or any substance to really related it to this particular offense, and, when you have the circumstance of an identified person, because, you know, a couple of them did have identified persons, I run into the problem that this person does not have fingerprints on or near the house. I run into the problem that this person may well have an alibi, I don't know.
>
> The relevance or actually the usefulness, I'll put it that way, to the defense at that particular suspect as I pointed out, it's phantom suspect. It's not -- it gives me somebody I can argue did it, and you guys can't show that he didn't.

Even if the evidence would have been admissible, there is not a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.(FN)

> (FN) The evidence introduced at trial was that: the Defendant's fingerprints were found on the bedroom window; a shoe print that matched his shoes was found in the adjoining field; the Defendant confessed to three witnesses (Muszynski, Kruger, Crisco); the Defendant wrote a letter to Muszynski

> indicating he had confessed to Kruger; testimony that the defendant's clothes were wet that morning -- had fallen in a canal; evidence of abrasions to the defendant's penis.

(TR780-81). The findings of the Rule 3.850 trial court are supported by competent substantial evidence, and should be affirmed in all respects.

On pages 58-72 of his brief, Jennings raises what appears to be a claim of ineffective assistance of counsel that seems to be pleaded as an alternative claim to the *Brady* claim. In the context of this case, the *Brady* claim is exclusive of a claim of ineffective assistance of counsel -- Jennings should elect the theory he wishes to base his claim upon. *Roberts v. State*, 568 So.2d 1255 (Fla. 1990). The mutually exclusive nature of *Brady* and ineffectiveness claims is a sufficient basis for denial of relief on the ineffective assistance of counsel claim.

The ineffective assistance of counsel claim is also not available to Jennings because it is outside of the scope of this Court's remand order. Specifically, this Court ruled (in the 1991 opinion) that:

> Therefore, in accordance with *Provenzano v. Dugger* [citation omitted], the two-year time limitation of rule 3.850 shall be extended for sixty days from the date of the disclosure **solely for the purpose of providing Jennings with the time to file any new *Brady* claims that may arise from the disclosure of the files.**

Jennings v. State, 583 So.2d at 319. [emphasis added]. This Court did not remand this case for the purpose of allowing Jennings to

raise **new** claims of ineffective assistance of counsel, nor did this Court remand this case to allow Jennings to relitigate ineffectiveness claims that have already been decided adversely to him. Jennings attempts to do both in his brief, and both "claims" are outside of the scope of this court's order remanding this case. Because that is true, the **new** ineffective assistance of counsel claims are time-barred, and the old ineffectiveness claims (which have been previously adjudicated adversely to Jennings) are not subject to relitigation.

To the extent that further discussion of the ineffective assistance of counsel component of this claim is necessary, the Rule 3.850 trial court decided the "cumulative error" ineffectiveness claim adversely to Jennings based upon the record and the evidence. (TR786). That finding is supported by competent substantial evidence, and should be affirmed in all respects.[16]

To the extent that Jennings raises a claim concerning the Billy Crisco statement, the Rule 3.850 trial court found that there was no "false testimony" presented through Crisco. (TR782). Jennings' claim simply has no factual basis, as the trial court found. Because that finding is supported by competent substantial evidence, it should not be disturbed.

---

[16] Of course, as set out above, a number of the specifications of ineffective assistance of counsel were addressed in this Court's 1991 opinion, and are not available to Jennings for relitigation. *See, Jennings v.* State, 583 So.2d at 319-21.

II. THE PENALTY PHASE JURY INSTRUCTION CLAIM

On pages 73-89 of his brief, Jennings argues that the Rule 3.850 trial court erroneously denied relief on his claims that the jury instructions on the heinous, atrocious, or cruel and cold, calculated, and premeditated aggravating circumstances were unconstitutionally vague. The trial court found that any error as to the jury instruction on the heinous, atrocious, or cruel aggravator was harmless beyond a reasonable doubt because the aggravator was established under any definition of the aggravating circumstance. (TR784). As to the cold, calculated, and premeditated aggravator, the court found that the claim concerning the jury instruction was not preserved by timely objection, but, even if it had been, any error was harmless under the facts. (TR785). Those findings are supported by competent substantial evidence, and should be affirmed in all respects. Moreover, this claim is outside the scope of this Court's order remanding this case, and, further, this Court decided the jury instruction claims adversely to Jennings in his prior collateral attack proceeding when it found them procedurally barred. *Jennings v. State,* 583 So.2d at 322. He is not entitled to relitigate those claims, nor was the trial court obligated to address them. Jennings has already lost on these claims, and that is a sufficient basis for the denial of relief.

To the extent that further discussion of the aggravators is necessary, this Court's direct appeal decision is dispositive. In

that proceeding, this Court held:

> Appellant's fifth and sixth points are that, in sentencing appellant to death, the trial court improperly applied the aggravating circumstances that the murder was "heinous, atrocious, and cruel," and that the murder was "committed in a cold, calculated, and premeditated manner." We disagree with the appellant that under the facts of this case and this Court's definition of "heinous, atrocious, and cruel," the trial court erred in finding this aggravating circumstance. We agree that the mindset or mental anguish of the victim is an important factor in determining whether the aggravating circumstance of heinous, atrocious, and cruel applies. It is not, however, the sole controlling factor as illustrated by our decisions in *Proffitt v. State*, 315 So.2d 461 (Fla. 1975), and *Spenkellink v. State*, 313 So.2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). As important is the totality of the circumstances of the incident and whether they reflect that this was a conscienceless, pitiless, and unnecessarily torturous crime that sets it apart from the norm of capital felonies. *State v. Dixon*, 283 So.2d 1 (Fla. 1973). We find that this case is similar to *Buford v. State*, 403 So.2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982), which also involved the murder and sexual assault of a young girl who was kidnapped from her home during the night. We do not find that our recent decision in *Herzog v. State*, 439 So.2d 1372 (Fla. 1983), should apply. Under the totality of the circumstances, and applying our decisions to the facts in the instant case, we find that the trial court properly applied the aggravating circumstance of heinous, atrocious, and cruel.
>
> We also find that the trial court properly applied the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner. The evidence shows that appellant located his victim, left, and then returned a short time later to enter the victim's home through her bedroom window and take her from her bed. His subsequent conduct in brutally fracturing her skull and then drowning her in the manner previously described establishes the heightened premeditation required for finding this aggravating circumstance.

Jennings v. State, 453 So.2d 1109, 1115 (Fla. 1984). As this Court

has previously found, both the heinous, atrocious, or cruel and the cold, calculated, and premeditated[17] aggravating circumstances are well established by the evidence. The Rule 3.850 trial court should be affirmed in all respects.

To the extent that Jennings alleges that there is an "intent element" to the heinous, atrocious, or cruel aggravator, that claim is foreclosed by binding precedent. *See, Guzman v. State,* 721 So.2d 1155 (Fla. 1998). To the extent that Jennings argues that his claim concerning the cold, calculated, and premeditated aggravator was properly preserved at the time of direct appeal, the Rule 3.850 trial court made alternative findings regarding that issue and found that, even if the cold, calculated, and premeditated claim **was** properly preserved, it was not a basis for relief because any error was harmless beyond a reasonable doubt. (TR785). That finding is correct, and should be affirmed in all respects. There is no basis for relief.

III. THE JUROR INTERVIEW CLAIM

On pages 89-92 of his brief, Jennings argues that he is entitled to some unspecified relief based upon the *Rule Regulating the Florida Bar* 4-3.5(d)(4) prohibition against post-trial juror interviews. This claim is not a basis for relief for the following

---

[17] To the extent that the trial court commented on the "heightened premeditation" component of the cold, calculated, and premeditated aggravator, this Court has already found that the requisite level of premeditation exists. *Jennings v. State*, 453 So.2d at 1115.

reasons.

The first reason that this claim is not a basis for relief is because it is not within the scope of this Court's remand order, and, consequently, is untimely. See page 11, above. This claim was raised for the first time in the post-remand pleadings, even though it has existed at least since the time of Jennings' trial, and could have been raised on direct appeal, or in Jennings' prior Rule 3.850 motion. The facts establish that this claim could have been raised long ago, and is now time-barred under settled law. *Zeigler v. State,* 654 So.2d 1162 (Fla. 1995).

In addition to being procedurally barred, this claim is insufficiently pleaded. As the Rule 3.850 trial court found, there is "no evidence of any juror misconduct." (TR787). Despite the hyperbole of Jennings' brief, the true facts are that no factual averments suggest what justification there is for allowing post-trial juror interviews. In the absence of specific factual averments, instead of averments that demonstrate nothing more than "discovery", there is no basis for allowing such interviews. The Rule 3.850 trial court properly denied relief on this claim.

Moreover, in addition to the foregoing procedural defenses, the juror interview claim lacks merit as a matter of law. This Court has repeatedly rejected this claim as a basis for relief, and Jennings has demonstrated no reason why this Court should change settled Florida law. *See, e.g., Devoney v. State,* 717 So.2d 501

(Fla. 1998); *Baptist Hospital of Miami, Inc., v. Maler*, 579 So.2d 97 (Fla. 1991). The trial court should be affirmed in all respects.

IV. THE "PUBLIC RECORDS" CLAIM

On pages 92-93 of his brief, Jennings argues that this Court must review various "public records" that were the subject of a November 6, **1991** order by the Circuit Court. A review of the order identifying the documents that were found to be exempt from disclosure by the Circuit Court establishes that the documents at issue are all material falling within the work-product exception to the public records law. (Supp. R. 371-2). There is no claim that the lower court improperly applied the law in finding these documents exempt from disclosure, nor is there any claim that the March 18, 1998, finding that "all public records requests have been complied with" is erroneous. (TR786). There is no basis for relief.

V. THE METHOD OF EXECUTION CLAIM

On page 93 of his brief, Jennings argues that "Florida's electric chair constitutes cruel and/or unusual punishment as the photographs of the Allen Lee Davis execution now establish". Despite the histrionics of Jennings' brief, the facts are that this Court decided this claim adversely to Jennings in *Provenzano v. Moore*, 24 Fla. L. Weekly S443 (Sept. 24, 1999). There is no basis for relief because the law in this State is contrary to the position taken by Jennings. Binding precedent dictates denial of

relief, as the Rule 3.850 trial court found.[18] That ruling is in accord with settled law, and should be affirmed in all respects.

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully submits that the denial of Rule 3.850 relief should be affirmed in all respects.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990

[18] This Court decided *Jones v. State*, 701 So.2d 76 (Fla. 1997), while the Rule 3.850 motion was pending in the Circuit Court. Of course, *Jones* was based on the events during the Medina execution, which were fully developed in that litigation, and cannot be "new evidence" for purposes of this proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Martin J. McClain, 9701 Shore Road, Apt. 1-D, Brooklyn, NY 11209, on this _____ day of December, 1999.

_____
Of Counsel